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IN THE
Supreme Court of the United States

OKANOGAN SCHOOL DISTRICT NO. 105, et al.,
Petitioners,

v.

DR. TERRY BERGESON, in her official capacity as Superintendent of Public Instruction of the State of Washington; and MICHAEL J. MURPHY, in his official capacity as the Treasurer of the State of Washington,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

STEPHEN M. RUMMAGE
Counsel of Record
JEFFREY L. FISHER
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150
Attorneys for Petitioners

95 pp & f/o

QUESTIONS PRESENTED

Under the federal forest payments program – codified at 16 U.S.C. §500 and accompanying notes – the federal government sends hundreds of millions of dollars each year to the forty-one states in which each national forest is located, "to be expended . . . for the benefit of the public schools and public roads of the county or counties in which such national forest is situated." Federal law further provides that these payments are intended to "supplement[] other available funds." Petitioners contend that a Washington State statute interferes with this federal program. The questions presented are:

I. Whether a public school district's status as a political subdivision of a state deprives it of Article III standing to bring a federal pre-emption claim against state officials.

II. Whether students have standing to challenge the constitutionality of a state law that, under their view of federal law, is preventing their school district from obtaining tens of thousands of dollars more of education funding.

III. Whether the federal forest payments program pre-empts a state law that renders federal forest aid a *substitute*, instead of a supplement, for state funds to which schools in forest counties "would otherwise be entitled." Wash. Rev. Code §28A.520.020(3).

PARTIES TO THE PROCEEDINGS

Okanogan School District No. 105, Omak School District No. 19, Republic School District No. 309, Tonasket School District No. 404, Quillayute School District No. 402, Methow School District No. 350, Nespelem School District No. 14, Oroville School District No. 410, Stephen Kunkel and Marile Kunkel, individually and as guardians of Karen Kunkel, William Kunkel, Frank Kunkel, and Benjamin Kunkel were plaintiffs-appellants below. All of these plaintiffs, except for Nespelem School District No. 14 and Oroville School District No. 410, are the Petitioners in this Court.

Cusick School District No. 59, Wenatchee School District No. 246, Newport School District No. 56, White Salmon School District No. 405, Cascade School District No. 228, North Beach School District No. 64, Kettle Falls School District No. 212, Entiat School District No. 127, Hoquiam School District No. 28, Sedro Woolley School District No. 101, and Okanogan County were plaintiffs in the district court but did not appeal the judgment against them to the Court of Appeals.

Dr. Terry Bergeson, in her official capacity of Superintendent of Public Instruction of the State of Washington, and Michael J. Murphy, in his official capacity of the Treasurer of the State of Washington, were the defendants-appellees below and are the Respondents in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Okanogan School District No. 105, Omak School District No. 19, Republic School District No. 309, Tonasket School District No. 404, Quillayute School District No. 402, Methow School District No. 350, Stephen Kunkel and Marile Kunkel, individually and as guardians of Karen Kunkel, William Kunkel, Frank Kunkel, and Benjamin Kunkel petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in *Okanogan Sch. Dist. v. Superintendent of Public Instruction*, No. 00-36096.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 291 F.3d 1161 (9th Cir. 2002), and is reprinted at App 1a-17a. The denial of the petition for rehearing and suggestion for rehearing en banc was not published and is reprinted at App. 35a. The oral opinion and judgment entered by the United States District Court for the Western District of Washington were not published and are reprinted at App. 18a-33a.

STATEMENT OF JURISDICTION

The Ninth Circuit's decision was entered on June 3, 2002. Petitioners' petition for rehearing and suggestion for rehearing en banc was denied on July 15, 2002, App. 35a, and this Petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III of the United States Constitution provides, in pertinent part:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity arising under this Constitution, the Laws of the United States . . . .

The Supremacy Clause of the United States Constitution, Art. VI, cl. 2, provides in relevant part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Section 500 of Title 16, U.S.C., provides in relevant part:

> On and after May 23, 1908, twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State or Territory in which such national forest is situated, to be expended as the State or Territorial legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: *Provided*, That when any national forest is in more than one State or Territory or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein.

The Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. 106-393, 114 Stat. 1607, is reprinted in statutory notes to 16 U.S.C. §500, and provides in pertinent part:

> Sec. 2(a) Findings – The Congress finds the following:

(1) The National Forest System, which is managed by the United States Forest Service, was established in 1907 and has grown to include approximately 192,000,000 acres of Federal lands.

(2) The public domain lands known as revested Oregon and California Railroad grant lands and the reconveyed Coos Bay Wagon Road grant lands, which are managed predominantly by the Bureau of Land Management were returned to Federal ownership in 1916 and 1919 and now comprise approximately 2,600,000 acres of Federal lands.

(3) Congress recognized that, by its decision to secure these lands in Federal ownership, the counties in which these lands are situated would be deprived of revenue they otherwise would receive if the lands were held in private ownership.

(4) These same counties have expended public funds year after year to provide services, such as education, road construction and maintenance, search and rescue, law enforcement, waste removal, and fire protection, that directly benefit these Federal lands and people who use these lands.

(5) To accord a measure of compensation to these affected counties for the critical services they provide to both county residents and visitors to these Federal lands, Congress determined that the Federal Government should share with these counties a portion of the revenues the United States receives from these federal lands.

(6) Congress enacted in 1908 and subsequently amended a law that requires that 25 percent of the revenue derived from National Forest

> System lands to be paid to States for use by the counties in which the lands are situated for the benefit of public schools and roads.
>
> . . . .
>
> (b) Purposes – The purposes of this Act are as follows: (1) To stabilize payments to counties to provide funding for schools and roads that supplements other available funds. . . .

Section 28A.520.020 of the Revised Code of Washington provides:

> (1) There shall be a fund known as the federal forest revolving account. The state treasurer, who shall be the custodian of the revolving account, shall deposit into the revolving account the funds for each county received by the state in accordance with Title 16, section 500, United States Code. The state treasurer shall distribute these moneys to the counties according to the determined proportional area. The county legislative authority shall expend fifty percent of the money for the benefit of the public roads and other public purposes as authorized by federal statute or public schools of such county and not otherwise. Disbursements by the counties of the remaining fifty percent of the money shall be as authorized by the superintendent of public instruction, or the superintendent's designee, and shall occur in the manner provided in subsection (2) of this section.
>
> (2) No later than thirty days following receipt of the funds from the federal government, the superintendent of public instruction shall apportion moneys distributed to counties for schools to public school districts in the

> respective counties in proportion to the number of full time equivalent students enrolled in each public school district to the number of full time equivalent students enrolled in public schools in the county. . . .
>
> (3) If the amount received by any public school district pursuant to subsection (2) of this section is less than the basic education allocation to which the district would otherwise be entitled, the superintendent of public instruction shall apportion to the district, in the manner provided by RCW 28A.510.250, an amount which shall be the difference between the amount received pursuant to subsection (2) of this section and the basic education allocation to which the school district would otherwise be entitled.

STATEMENT OF THE CASE

This case challenges the constitutionality of a Washington statute, Wash. Rev. Code §28A.520.020(3), that reduces state educational funding to public school districts by the precise amount that those districts receive under the federal forest aid program. Petitioners contend that this state law runs afoul of the federal requirement that federal forest aid dollars "benefit" impacted schools and roads by "supplement[ing] other available funds."

1. In 1908, one year after it established the national forest system, the federal government enacted a law requiring it annually to pay states 25% of all moneys received from national forests within their borders. The statute directs that these forest payments are "to be expended as the State . . . legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated." 16 U.S.C. §500. This program remained substantially unchanged until 2000, when, in the

face of sharply declining federal timber sales (and thus declining federal aid under §500), Congress passed the Secure Rural Schools and Community Self-Determination Act, Pub. L. 106-393, 114 Stat. 1607 (2000), *reprinted in* notes to 16 U.S.C. §500. One purpose of this Act was "[t]o stabilize payments to counties to provide funding for schools and roads that *supplements* other available funds," *Id.* §2(b)(1) (emphasis added), by allowing forest communities the periodic choice of receiving their traditional 25% payment or an alternative minimum payment. *See id.* §102(b).

2. The State of Washington receives a large amount of federal forest aid. In 2001, it received over $44 million, the third highest payment among the states. App. 53a. Washington law directs the State Treasurer to distribute this federal aid to counties in which national forests are situated, according to the proportional area of national forest in each county. Wash. Rev. Code §28A.520.020(1). County legislative authorities may use 50% of this money for any purpose authorized by federal law, which typically results in road improvements. *Id.* State law then directs the counties to give the remaining 50% to their public schools. *Id.*

Washington, unlike every other state except Oregon that receives federal forest aid, uses the portion of the aid it directs to school districts as a *substitute* for state dollars that it otherwise would give them. Under Washington law, each school district in the State is guaranteed a "basic education allocation" of state funding, which represents a minimum level of funding to pay for educational supplies and services. Wash. Rev. Code §28A.150.250; App. 5a. But when the State Superintendent of Public Instruction dispenses those basic education dollars, she does not give school districts that receive federal forest aid their full allocation. Instead, those school districts receive "an amount which shall be the difference between the amount received pursuant to [federal

forest aid payments] and the basic education allocation to which the district would otherwise be entitled." Wash. Rev. Code §28A.520.020(3). This "offsetting" mechanism ensures that forest county school districts do not receive one penny more by virtue of the federal forest aid program than they otherwise would receive from the State itself.

3. Petitioner Okanogan School District No. 105 is located in Okanogan County, Washington. Approximately 70% of the County's land is located within the Okanogan National Forest. Since 1973, the federal government has listed Okanogan County as an "economically distressed" area, in large part due to declines in local forestry and agriculture industries. Almost three-fourths of the School District's students qualify for free or reduced lunch programs.

Okanogan School District is utterly cash-strapped. To provide but a few specific examples, its textbooks are old and outdated, and it does not have enough of even those books to allow all children to take them home at night. Its facilities are inadequate. Teachers must hold basic classes in the hallways. One elementary school lacks a library, music facilities, and a computer lab. The vocational building needs major electrical, ventilation, and structural repairs.

Petitioners Stephen and Marie Kunkel have three children who attend schools in the Okanogan School District, the youngest of whom is now in seventh grade. As a result of the School District's inadequacies, the Kunkels' children suffer numerous disadvantages in programs in which they participate and in facilities they use. App. 12a.

Over the last ten years, Okanogan School District has received about $100,000 per year in federal forest aid. The School District, however, receives no benefit from those funds because the State has reduced, and continues to reduce,

the District's basic education allocation by exactly the amount of federal forest aid it receives.

4. Okanogan School District, several similarly situated districts, App. 4a n.1, and the Kunkels (on behalf of themselves and their children) filed this action in December 1999 in the U.S. District Court for the Western District of Washington, alleging that Wash. Rev. Code §28A.520.020(3) violated the Supremacy Clause. Plaintiffs sought an injunction preventing Respondents from reducing forest school districts' basic education allocation by the amount the districts receive under the federal forest aid program.[1]

In May 2000, the district court dismissed the School Districts' claim for lack of standing on the basis of Ninth Circuit precedent barring political subdivisions from challenging the validity of state statutes in federal court. App. 20a-21a. In November 2000, the district court dismissed the Kunkels' claim for lack of standing. App. 29a-30a. Although no plaintiffs remained under its rulings, the district court nevertheless reached the merits and stated that the federal forest aid statutes did not pre-empt Washington's offsetting law. App. 29a-29a, 31a.

The Ninth Circuit affirmed. The court first held it was "bound by" circuit precedent to hold that the School Districts lacked standing. App. 10a. The Ninth Circuit then found that the Kunkels "have sufficiently shown injury in fact" but that their standing was "problematic" because "it is difficult to say that the deficiencies in programs and facilities about which the Kunkels complain are caused by the state's

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[1] In addition to seeking injunctive relief with federal jurisdiction premised on 28 U.S.C. §1331, *see, e.g., Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 259 n.6 (1985), Petitioners also included a claim for damages under 42 U.S.C. §1983. The district court dismissed the damages claim, and Petitioners did not appeal that ruling.

practice of crediting forest fund reserves against the district's [basic education allocation] rather than by too little funding in general, or would be redressed by changing it." App. 3a, 12a. Without ever resolving these standing issues, the Ninth Circuit decided to bring them "into better focus" by evaluating "the Kunkels' position on the merits." App. 14a. It concluded that nothing in the federal forest aid program prevents the State from using the federal aid as a substitute, instead of a supplement, for otherwise available education funding. App. 14a.

Petitioners filed a timely petition for rehearing and suggestion for rehearing en banc, which the court denied without comment on July 15, 2002. App. 35a. This Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

This case provides this Court with the opportunity to resolve significant Article III standing issues that have divided the federal courts of appeals and to prevent millions of tremendously important federal aid dollars from being wrenched away from their intended recipients. Each of these issues is worthy of review in its own right. Together, they present an especially compelling case for certiorari.

1. The Ninth Circuit's holding that public school districts lack standing to bring pre-emption claims presents an archetypal issue worthy of certiorari. The basis for this holding – the supposed principle that no political subdivision may ever challenge the constitutionality of a state law in federal court – has been rejected by all seven other courts to consider the issue, including three federal courts of appeals. Now that the Ninth Circuit has made it plain that is has no intention of reconsidering its view, this Court is the only institution capable of resolving this conflict.

2. The Ninth Circuit's ruling that there are "serious questions about [the students'] constitutional standing," App. 14a, also warrants review. This ruling explicitly rested on the court's evaluation of the students' "position on the merits," *id.*, in direct contravention of the long settled rule that "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). The Ninth Circuit's refusal to confer standing on students who sue state officials for the refusal to treat federal aid as a supplement to state funding also creates a conflict with the Sixth Circuit's holding in *Gwinn Area Community Schs. v. Michigan*, 741 F.2d 840 (6th Cir. 1984), and a three-judge district court's decision in *Shepheard v. Goodwin*, 280 F. Supp. 869 (E.D. Va. 1968). This Court should resolve this conflict because denying students standing in this situation, if combined with a prohibition against political subdivision standing, threatens to make all conditions placed on federal education grants unenforceable in federal court.

3. Finally, the Ninth Circuit's construction of the federal forest aid program warrants review. Congress and the current Administration have emphasized that the hundreds of millions of dollars dispensed under this program are vital to rural education. This is particularly so in western states, for over 85% of this aid goes to states within the Ninth Circuit. But while federal law expressly directs states to use forest aid to "benefit" public schools and roads where national forests are situated, 16 U.S.C. §500, by "provid[ing] funding . . . that *supplements* other available funds," Secure Rural Schools §2(b)(2) (emphasis added), Washington and Oregon – two of the three states that receive the largest forest aid payments – use this money as a *substitute* for otherwise available state educational funding. These state "offsetting" laws are at such loggerheads with the plain text of the controlling federal

statutes, as well as the compensatory purpose behind them, that the Ninth Circuit's refusal to hold Washington's law pre-empted demands further scrutiny.

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT IN THE CIRCUITS OVER WHETHER POLITICAL SUBDIVISIONS HAVE STANDING TO BRING PRE-EMPTION CLAIMS AGAINST STATE OFFICIALS.

A. The Ninth Circuit's Rule that Political Subdivisions Lack Standing to Bring Pre-emption Claims Against State Officials Directly Conflicts with All Seven Other Courts to Consider the Issue, Including Three Federal Courts of Appeals.

The Ninth Circuit held in *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980), that a state's political subdivision may not challenge the validity of a state statute in federal court, even if that challenge is based on the Supremacy Clause. The Ninth Circuit in this case concluded that it was "bound by *South Lake Tahoe*" to rule that the Petitioner School Districts lack standing to sue Washington State officials. App. 10a.

Each of the three other circuits – and all seven other courts in total – to consider whether political subdivisions of a state may sue state officials for constitutional violations has rejected *South Lake Tahoe*'s general prohibition against such suits and held that local governmental bodies may do so in the context of the Supremacy Clause. *See Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628-30 (10th Cir. 1998) (school districts); *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979) (school districts); *United States v. Alabama*, 791 F.2d 1450, 1454-55 (11th Cir. 1986) (state university). The Fourth Circuit also has granted a school district standing to bring a preemption claim against state officials without

finding any political subdivision impediments, *School Bd. of Richmond v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987), and a district court in that circuit squarely has held that no such impediment exists. *City of Bristol v. Earley*, 145 F. Supp. 2d 741, 744-45 (W.D. Va. 2001). Federal courts in Puerto Rico and California have reached the same conclusion, as has the California Supreme Court while applying Article III-type principles. *Santiago Collazo v. Franqui Acosta*, 721 F. Supp. 385, 393 (D.P.R. 1989); *San Diego Unified Port Dist. v. Gianturco*, 457 F. Supp. 283, 289-90 (S.D. Cal. 1978), *aff'd on other grounds*, 651 F.2d 1306, 1309 n.7 (9th Cir. 1981); *Star-Kist Foods, Inc. v. County of Los Angeles*, 719 P.2d 987, 989-91 (Cal. 1986).

Three Justices of this Court, in fact, noted the Ninth Circuit's conflict with the Fifth Circuit on this issue as soon as *South Lake Tahoe* was issued and voted to grant certiorari in that case. *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S. 1039, 1041-42 (1980) (White, J., dissenting from denial of certiorari). This Court, however, denied certiorari, perhaps because the Ninth Circuit's opinion did not separately discuss the city's standing to bring its pre-emption claim or because the issue could benefit from percolation.

Since that denial of certiorari, the Ninth Circuit has made two things clear. First, the Ninth Circuit considers *South Lake Tahoe*'s "broad language . . . to foreclose the possibility of" allowing any political subdivision to bring a preemption claim. *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998); *accord Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1107 (9th Cir. 1999). The panel in this case thus stated unequivocally that "*South Lake Tahoe* controls" here because "[s]chool districts are a political subdivision of the state, and political subdivisions of a state may not challenge the validity of a state statute in federal court." App 3a, 9a.

Second, the Ninth Circuit has no intention of reconsidering the scope of *South Lake Tahoe*'s standing rule. In 1998 in *Burbank-Glendale-Pasadena*, the losing political subdivision suggested that the court reconsider *South Lake Tahoe*'s application to pre-emption claims in light of the growing chorus of disagreement on that score, but the court refused to do so. *See* 136 F.3d at 1364 (Kozinski, J., concurring).[2] One year later, a Ninth Circuit judge suggested that the court "take another look at *South Lake Tahoe* and its progeny," *Belshe*, 180 F.3d at 1109 (Hawkins, J. concurring), but the court once again refused to do so. In this case, the School Districts sought rehearing en banc, but no Ninth Circuit judge even called for such review. The circuit plainly has resolved to adhere to *South Lake Tahoe* unless and until this Court directs otherwise.

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[2] Although Judge Kozinski suggested there that the Ninth Circuit delay any reconsideration of *South Lake Tahoe* at least until the requesting party provided briefing on whether allowing political subdivisions to pursue pre-emption claims is in tension with the Tenth Amendment's anti-commandeering rule, *see* 136 F.3d at 1364-65, it is now clear that the presence of such briefing is immaterial. Petitioners provided several pages of briefing on this issue – to no avail. In any event, permitting local governmental entities to bring pre-emption claims in federal court to enforce the terms of federal aid programs does not violate the Tenth Amendment because it does not force any state official to do anything: if states do not like the terms of a federal grant, they can simply turn down the funds. Once a state has accepted federal funds earmarked for local governments, allowing local entities to bring pre-emption actions simply permits them, if they so choose, to implement a federal right to those funds. *See Printz v. United States*, 521 U.S. 898, 913 (1997) (state officers may "take an active role in the implementation of federal law" if they do so "without a congressional directive that they implement it"); Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 Mich. L. Rev. 1201, 1210-15, 1248 (1999) (discussing this standing issue at length and finding no commandeering problem).

There can no longer be any doubt that review by this Court is necessary to resolve the conflict on this issue. The Ninth Circuit's decisions show that the standing of political subdivisions arises in numerous situations – ranging from Medicaid to aviation safety – in which Congress gives block grants to states to use for specifically delineated governmental purposes. In addition, numerous federal laws bestow grants-in-aid directly on local governmental entities. *See, e.g.*, Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control,* 97 Mich. L. Rev. 1201, 1202 (1999). The ability of these entities to bring suit in federal court to enforce the conditions placed on those grants should not depend on the circuit in which the lawsuit is brought.[3]

B. The Ninth Circuit's Bar Against Political Subdivisions Bringing Pre-emption Claims Against State Officials is Inconsistent with Decisions of this Court.

In two cases in which this Court has confronted a lawsuit between a political subdivision and a State, this Court, contrary to the Ninth Circuit, has reached the merits without noting any justiciability problems. In *Lassen v. Arizona,* 385 U.S. 458 (1967), this Court considered an action that was "in form and substance a controversy between two agencies of the State of Arizona," the State Land Commissioner and the State Highway Department. *Id.* at 459 n.1. This Court "concluded that this [was] a case with which [it could] properly deal" because the Land

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[3] The Ninth Circuit's suggestion that political subdivisions might be able to bring such suits in state court, App. 10a, is irrelevant for Article III purposes and, in any event, provides cold comfort. For a variety of reasons plaintiffs challenging the constitutionality of a state law usually prefer to do so in federal court, particularly when the dispute involves the Supremacy Clause.

Commissioner was "a substantially independent state officer." *Id.* In *Washington v. Seattle Sch. Dist. No. 1,* 458 U.S. 457 (1982), this Court similarly permitted a public school district to sue its parent state. Although the opinion did not separately address the issue of standing, this Court's assumption of jurisdiction carries weight here, particularly because the plaintiff-political subdivision was a school district from the same state as in this case and the decision came two years after the *South Lake Tahoe* proceedings. *See Brown Shoe Co. v. United States,* 370 U.S. 294, 307 (1962) ("While not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio,* neither should we disregard the implications of an exercise of judicial authority assumed to be proper.").[4]

The assumptions of jurisdiction in *Lassen* and *Seattle School District* also comport with this Court's rule that public school districts, counties, and municipalities are not "arms of the State" entitled to Eleventh Amendment immunity. *See, e.g., Monell v. New York City Dept. of Soc. Servs.,* 436 U.S. 658, 690 n.54 (1978); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 280 (1977) (public school board is "more like a county or city than . . . like an arm of the State"); *Moor v. County of Alameda,* 411 U.S. 693, 717-21 (1973). This rule rests on the recognition that local governmental entities are substantially independent corporations that act for themselves and not their parent states. *See Moor,* 411 U.S. at 717-21. The natural implication of local governmental bodies' independence is that when they claim their parent states are depriving them of their federal

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[4] This Court also exercised jurisdiction over a public school district's federal pre-emption claim against another political subdivision of the same state in *Lawrence County v. Lead-Deadwood Sch. Dist.,,* 469 U.S. 256 (1985), and explicitly noted that the lawsuit was a proper one for federal courts to entertain. *Id.* at 259 n.6.

rights, the dispute is concrete enough to confer Article III jurisdiction on federal courts.

The Ninth Circuit's failure to follow the direction of this Court's recent precedent stems from an overreading of broad language in *Williams v. Mayor & City Council of Baltimore,* 289 U.S. 36 (1933), and *Trenton v. New Jersey,* 262 U.S. 182 (1923). In those cases, this Court rejected Fourteenth Amendment claims by two cities against their parent states, explaining that "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Williams,* 289 U.S. at 40.

When the plaintiffs in *South Lake Tahoe* alleged that a state law violated the Fourteenth Amendment and the Supremacy Clause, the Ninth Circuit cited *Williams* and *Trenton* for the rule that "[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment." 625 F.2d at 233 (quotation omitted). But then, with no further analysis, the court drew the conclusion that the plaintiffs could not challenge state laws "on constitutional grounds" generally. *Id.* at 233-34. The Ninth Circuit never paused to consider whether states' political subdivisions might have distinct rights under the Supremacy Clause. Nevertheless, as explained *supra* at 12, subsequent panels of that court ruled that *South Lake Tahoe*'s "broad language . . . foreclose[s] the possibility of" allowing subdivisions to bring preemption claims. *Burbank-Glendale-Pasadena Airport*, 136 F.3d at 1364.

Every other court to consider the standing of political subdivisions in the context of the Supremacy Clause has deduced that the *Williams/Trenton* line of cases "are substantive interpretations of the constitutional provisions involved" and that they do *not* hold that political subdivisions

never have standing to challenge the validity of state laws. *Branson,* 161 F.3d at 629 (quoting *Rogers,* 588 F.2d at 1068)). In allowing subdivisions' pre-emption claims to proceed, these courts have the better view because, in contrast to the Fourteenth Amendment and other constitutional provisions that grant "individual rights," the Supremacy Clause protects "structural rights." *Branson*, 161 F.3d at 628. When state political subdivisions bring preemption claims, therefore, they are no simply questioning the political will of their creators, but rather are invoking a right to enjoy benefits that a specific federal statute has conferred upon them. *See id.* at 629-30; *Rogers*, 588 F.2d at 1068-70; *Gianturtco,* 457 F. Supp. at 289-90.[5]

The only circumstances under which a political subdivision's preemption claim might properly be barred would be when the subdivision is so closely related to its parent state that it is an "arm of the state," making any dispute an internal disagreement on state policy rather than a true "case or controversy." *See Branson,* 161 F.3d at 630; *Rogers,* 588 F.2d at 1065. But, as in the Tenth and Fifth Circuit cases, that is not the situation here. The Petitioner-School Districts are fighting with State officials for the use of millions of dollars, and the Washington Supreme Court has explicitly held that school districts' interests are sufficiently at odds with the State's when pursuing educational funding

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[5] The Ninth Circuit's suggestion that forest area counties might be more direct beneficiaries than school districts under the federal forest aid program, App. 9a, misapprehends the federal program and the nature of Petitioners' pre-emption claim. Petitioners are challenging Wash. Rev. Code §28A.520.020(3), which reduces state educational funding dispensed to school districts by the exact amount that school districts receive in federal forest aid. This state law harms forest *school districts* and violates their federal rights because it renders forest aid a substitute, instead of a supplement, for otherwise available education funding. Wash. Rev. Code §28A.520.020(3) does not deny any money to forest counties' treasuries.

that "it is clear . . . [that the] interests of the District[s] are not theoretical; they involve actual financial constraints imposed upon the District by the challenged system itself." *Seattle Sch. Dist. No. 1 v. State,* 585 P.2d 71, 82 (Wash. 1978). This state law erases any doubt that a justiciable controversy is present here. *See Romer,* 161 F.3d at 629; *Rogers,* 588 F.2d at 1065-66; *Earley,* 145 F. Supp. 2d at 744-45.

II. THE NINTH CIRCUIT'S TREATMENT OF THE STUDENTS' STANDING FLOUTS THE TEACHINGS OF THIS COURT AND CREATES AN INTER-CIRCUIT CONFLICT.

The Ninth Circuit never resolved whether the Kunkels, a family with students in Okanogan School District, have standing. The court held that they have shown an injury-in-fact, but then stated that issues regarding causation and redressability "raise serious questions about [their] constitutional standing." App. 14a. The court continued that "[t]hese standing concerns come into better focus when the Kunkels' position on the merits is considered." *Id.* After analyzing and rejecting the Kunkel's proposed construction of 16 U.S.C. §500 and the Secure Rural Schools Act, the Ninth Circuit held that the district court's judgment for the State (in which it held *both* that no plaintiff had standing and that Washington's offsetting law was not pre-empted, App. 27a-31a) should be affirmed. App. 17a.

The Ninth Circuit's intertwining of Article III concerns with questions involving the interpretation of federal statutes flouts this Court's decision, only four years ago, in *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94 (1998), and its refusal to confer standing on the Kunkels creates a conflict in the circuits.

A. The Ninth Circuit's Intertwining of Article III Concerns with Its Assessment of the Students' Position on the Merits Contravenes this Court's Decision in *Steel Co. v. Citizens for a Better Environment.*

In *Steel Co.*, this Court reaffirmed the longstanding rule that "[t]he requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception.'" 523 U.S. at 94-95 (citation omitted). Of particular relevance here, the Court explained:

> "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." Rather, the district court has jurisdiction "if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another."

Id. at 89 (quoting *Bell v. Hood,* 327 U.S. 678, 682, 685 (1946)). In other words, "[t]he question whether a federal statute creates a claim for relief is not jurisdictional." *Steel Co.,* 523 U.S. at 92 (quotation omitted). "For a court to pronounce on the meaning or the constitutionality of a state or federal statute when it has no jurisdiction is, by very definition, for a court to act ultra vires." *Id.* at 101-02; *see also United States v. Texas Tech Univ.,* 171 F.3d 279, 286-87 (5th Cir. 1999) ("To rule on a merits question before, or in addition to, answering the omnipresent jurisdictional question would contravene the well-established principle that federal courts may not issue advisory opinions.").

There is no exception to this rule when, as here, a court has "concerns" about redressability. App. 14a. To the contrary, *Steel Co.* squarely held that "uncertainty about whether the plaintiff's injuries can be redressed . . . [due to] uncertainty about whether a cause of action existed . . . is precisely what *Bell* holds *not* to be an Article III 'redressability' question." *Steel Co.*, 523 U.S. at 96 (quotation marks omitted).

The Ninth Circuit's treatment of the Kunkels' standing is irreconcilable with *Steel Co.* and, indeed, with basic Article III principles. The Ninth Circuit ruled on the merits of the case before resolving whether the Kunkel's injuries were redressable. This Court should not allow this circuit precedent to stand.

B. The Ninth Circuit's Refusal to Confer Standing on the Students Creates a Conflict in the Circuits.

The Ninth Circuit refused to hold that the Kunkels had standing based on their allegation that the State is withholding nearly $100,000 per year from their school district. This ruling creates a conflict with every court to consider similar allegations, including implicit holdings of this Court.

In *Gwinn Area Community Schs. v. Michigan*, 741 F.2d 840 (6th Cir. 1984), a student challenged Michigan's formula for funding public schools. The student's complaint – like the Kunkels' here – was that Michigan was improperly offsetting federal impact aid payments (issued under a program concerning federal military installations) against state educational funding. Although the student's pre-emption claim was dismissed for technical reasons not applicable

here,[6] the Sixth Circuit held that the student had standing to press related claims against the offsetting law because the student was "in position[] to suffer direct and tangible injuries from the deduction of federal impact aid from state aid payments." *Id.* at 844. In *Shepheard v. Goodwin,* 280 F. Supp. 869, 874 (E.D. Va. 1968), moreover, a three-judge district court recognized that students had standing to bring a pre-emption claim on exactly this basis.

These opinions conferring standing on students in the Kunkels' situation are consistent with this Court's assumption of jurisdiction over two cases in which students claimed that states' financial allocations among their public school districts discriminated against poor districts. *See Papasan v. Allain,* 478 U.S. 265 (1986); *San Antonio Indep. Dch. Dist. v. Rodriguez,* 411 U.S. 1 (1973); *see also School Bd. v. Baliles,* 829 F.2d 1308, 1311 (4th Cir. 1987) (students have standing to challenge State's failure to distribute money to their school district pursuant to desegregation order). They also properly recognize that delivering tens of thousands of dollars to school districts likely will improve students' education – especially when, as here, the school districts and students offer detailed affidavits describing programs in need of extra funding. *See Shepheard,* 280 F. Supp. at 874. It makes no sense to play a shell game, as the Ninth Circuit did, regarding precisely where that benefit will accrue, App. 13a, for "[t]he basic reason school districts exist is for the education of children through . . . education programs." *Seattle Sch. Dist.,* 585 P.2d at 82. When school districts receive money, federal courts should deem it likely that the districts will use it for the benefit of their students.

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[6] The Sixth Circuit affirmed the dismissal of the plaintiffs' pre-emption claim because the federal impact aid statute at issue contained an exhaustion requirement and the plaintiffs had failed to use that provision. *Id.* at 842-43 & n.1. The federal forest aid program does not contain any exhaustion requirement.

The only possible distinction between *Gwinn* and *Shepheard* and this case is that the federal money at issue in those cases was sent directly to public schools, while the federal money here is earmarked "for public roads or schools as the state deems best." App. 15a. But this distinction makes no difference in terms of redressability. This Court has explained that spending discretion that governmental bodies have under federal law presents a redressability problem only if "courts cannot presume either to control or predict" how those bodies will choose to use that discretion. *ASARCO v. Kadish,* 490 U.S. 605, 615 (1989) (plurality opinion). No such guesswork is necessary here. Washington law provides that one-half of its federal forest dollars "must [be] disburse[d] . . . directly to school districts." App. 3a (summarizing Wash. Rev. Code §28A.520.020(2)). This state law puts this case on all fours with *Gwinn* and *Shepheard* for purposes of standing and establishes redressability here. *See also Rogers,* 588 F.2d at 1063-64 (redressability demonstrated when state legislature would have to repeal state law to evade effect of decision).

III. REVIEW IS NECESSARY TO ENSURE THAT MILLIONS OF FEDERAL FOREST AID DOLLARS BENEFIT THEIR INTENDED RECIPIENTS.

A. Proper Administration of the Federal Forest Aid Program is Enormously Important to Rural Schools Throughout the Country, and Particularly in the West.

When the federal government appropriates land as a National Forest, "the counties in which these lands are situated [are] deprived of revenues they would otherwise receive if the lands were held in private ownership." Secure Rural Schools Act §2(a)(3). This loss of revenue is felt most keenly in inability to levy property taxes against federal land.

App. 4a. In addition, Congress has found that the presence of national forest land raises counties' costs of providing various public services in those areas. Secure Rural Schools Act §2(a)(4). Hence, the federal forest aid program is designed "[t]o accord a measure of compensation to these affected counties" for the economic impact of these federal lands, by sending money to states "for the benefit of the public schools and public roads of the county or counties in which [each] national forest is situated." *Id.* §2(a)(5) & 16 U.S.C. §500.

In 2001, the federal government sent about $384 million in federal forest aid payments to forty-one states and Puerto Rico. App. 50a-53a. Over 85% of this money went to eight states within the Ninth Circuit. *See* App. 53a.[7]

The money distributed under this program is vital to rural school districts. In 2000, when Congress enacted the Secure Rural Schools Act to stabilize waning levels of federal forest payments, one congressman explained that rural schools "have cut their services to the bone" and that this money "provides critical funding for schoolchildren in hundreds of rural communities all over America who have been left behind by the policies of their own government." App. 37a (reproducing 146 Cong. Rec. H9612 (daily ed. Oct. 10, 2000) (statement of Rep. Goodlatte)). Other congress-persons added that this "rural education [Act is] very important to many, many communities around the country" because it "fulfils [the federal government's] financial commitment" to communities with federal forests and "provide[s] an equitable and stable source of funding for schools in and

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[7] Rounded to the nearest hundred thousand dollars, Oregon received $154.8 million; California, $65.7 million; Washington, $44.4 million; Idaho, $22.8 million; Montana, $13.5 million; Alaska, $9 million; Arizona, $7 million; Nevada $0.4 million. App. 53a.

near our forest areas." App. 40a, 42a, 43a (statements of Reps. Steinholm, Clayton & Boyd).

The current Administration also has proclaimed its view that the federal forest aid program is necessary to improve public schools in rural communities. In releasing the latest round of payments, the Secretary of Agriculture said that "[i]nvesting in schools and education, particularly in our rural communities, is a high priority for this Administration." App. 50a (reproducing UDSA Press Release No. 0257.01) (Dec. 13, 2001). She further described the Secure Rural Schools Act as "historic legislation" intended to allow rural communities to "buy new books, repair or expand schools or hire more teachers to help improve the education opportunities for our nation's children." App. 51a.

Thirty-nine of the forty-one states that receive federal forest payments give that money to their forest counties as a *supplement* to other state aid for local schools and roads. *See, e.g.,* Cal. Educ. Code §§ 2300, 14002, 14041. But Washington and Oregon use the portion of this federal aid that they allocate to forest counties' schools as a *substitute*, instead of a supplement, for "otherwise available" state educational funding. Wash. Rev. Code §28A.520.020(3); *see also* Or. Rev. Stat. §327.013(9)(e).[8] These "offsetting" laws leave the public schools in forest counties in exactly the same financial position that they would occupy if the federal government did not remit one penny of federal forest aid. The general treasuries of Washington and Oregon benefit

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[8] Or. Rev. Stat. §327.008(2) provides that "[t]here shall be apportioned from the State School Fund to each school district a State School Fund grant, consisting of the positive amount equal to a general purpose grant and a facility grant and a transportation grant minus local revenue." Or. Rev. Stat. §327.013(9)(e) defines "local revenue" to include "revenue received by the district from the 25 percent of federal forest reserve revenues required to be distributed to schools."

from the "schools" portion of the federal aid payments, but these states' forest county school districts do not.

The legality of these states' offsetting statutes is of substantial importance. In 2001, Washington and Oregon received $44 million and $154 million respectively in federal forest aid. App. 53a. This represented about 54% of the total funds distributed nationally. The effect on these states' rural school districts is profound. Okanogan School District, the lead plaintiff here, is losing out on almost $100,000 a year. Its lack of funding is forcing it – in direct contravention of the "high priority for this Administration," App. 50a – to forego new supplies, teach classes in cramped and unsafe facilities, and terminate teaching positions.[9] Other school districts in the State are "similarly situated." App. 4a.

B. The Ninth Circuit Seriously Misconstrued the Federal Forest Aid Program in Refusing To Hold that It Pre-empted Washington's Offsetting Law.

In upholding Washington's offsetting law, the Ninth Circuit construed the federal forest aid statutes so as to render absolutely meaningless Congress' two primary conditions on that program – conditions that are stated plainly in the text of the governing statutes. Once one rectifies the court's inexplicable oversights, it is apparent that state offsetting laws are pre-empted.

The Supremacy Clause pre-empts any state law that "'under the circumstances of th[e] particular case . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress – whether that 'obstacle' goes by the name of 'conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency;

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[9] In the past year alone, the School District's financial crisis has forced it to eliminate three more teaching positions.

violation; curtailment; . . . interference,' or the like." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

This Court has applied this general rule to strike down a state law that prevented localities from enjoying the full benefit of federal impact aid funds distributed, like the aid at issue here, to "compensate[] local governments for the loss of tax revenue resulting from the tax-immune status of federal lands located in their jurisdictions, and for the cost of providing services related to these lands." *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 258 (1985). This Court explained that the state's treatment of this money as a "windfall" prevented "[t]he federal money [from] serv[ing] its intended purpose of compensating local governments for extraordinary or additional expenditures associated with federal lands." *Id.* at 269. Even closer to the situation at hand, lower courts uniformly have invalidated state offsetting laws that reduce state educational funding by the amount such districts receive under another federal impact aid program designed to compensate for the costs attendant to federally occupied land. *See Triplett v. Tiemann*, 302 F. Supp. 1244 (D. Neb. 1969); *Carlsbad Union Sch. Dist. v. Rafferty*, 300 F. Supp. 434 (S.D. Cal. 1969), *aff'd*, 429 F.2d 337 (9th Cir. 1970) (state conceded issue on appeal); *Hergenreter v. Hayden*, 295 F. Supp. 251 (D. Kan. 1968) (three-judge court); *Douglas Indep. Sch. Dist. No. 3 v. Jorgenson*, 293 F. Supp. 849 (D.S.D. 1968) (three-judge court); *Shepheard v. Godwin*, 280 F. Supp. 869 (E.D. Va. 1968) (three-judge court).

The Ninth Circuit distinguished these impact aid cases on two grounds, but each ground overlooks a basic and plainly stated element of the forest aid program. First, the court noted that "no state is obliged to spend *any* forest fund money for schools" because "the states may use these moneys for public roads *or* schools as the state deems best."

App. 15a. This statement accurately recites this Court's holding in *King County v. Seattle Sch. Dist. No. 1*, 263 U.S. 361, 364-65 (1923), but in no way does it vindicate Washington's offsetting statute. That a state may use forest money for one other federally approved purpose does not allow it to use that money for any purpose whatsoever. Here, the money that the State saves by offsetting forest schools' state educational funding against federal forest aid is not used for schools *or for roads*. The money simply remains in the State's general fisc, to be used as a windfall for whatever purpose, in whatever location, the state deems fit. The State, in short, is obstructing the operation of the forest payment program because it is refusing to use half of the payments to the benefit *either* congressionally approved purpose.

Second, the Ninth Circuit reasoned that, unlike the texts of other federal statutes establishing similar programs, 16 U.S.C. §500, the forest fund enabling statute, does not "expressly stipulate[e] that the state is to use the federal aid only to supplement the amount of funds that would be available from non-federal sources." App. 15a. The Ninth Circuit acknowledged the text of the Secure Rural Schools Act refers to "stabiliz[ing] payments to counties to provide funding for schools and roads that *supplements other available funds,*" and the court seemed to recognize that this language prohibits state offsetting laws. App. 16a (quoting in §2(b)(1)) (emphasis added). But the court concluded that §2(b)(1) does not clarify the intent behind §500's forest aid payments, but rather simply refers to other federal aid programs that are "consolidate[ed]" in the Secure Rural Schools Act that already require supplementing. App. 16a-17a.

The Ninth Circuit plainly misread the Secure Rural Schools Act. Only one other federal aid program besides the forest program is consolidated in that Act: the Oregon and California Grant Lands Payments Act ("O&CGLPA"), 43

U.S.C. §1181f. *See* Secure Rural Schools Act §2(a)(7).[10] Section 1181f, however, does not contain any must-supplement language. Nor are payments made under the O&CGLPA even earmarked for schools and roads.

There can be no doubt, therefore, that §2(b)(1)'s description of payments "to provide funding for schools and roads that supplements other available funds" refers to the forest payments program. That language must refer to *some* program. *See Colautti v. Franklin,* 439 U.S. 379, 392 (1979) (noting "elementary cannon of construction that a statute should be interpreted so as not to render one part inoperative"). And there is no other program to which Congress could be referring, for no statute affected by the Secure Rural Schools Act expressly prohibits states from substituting federal dollars from state funds, and no statute besides §500 earmarks funds for schools and roads.

Once it becomes clear that the Secure Rural School Act's admonition to "supplement[] other available funds" refers to payments under the federal forest aid program, it is impossible to give effect to that language without invalidating Washington's offsetting statute. Washington's offsetting law provides that school districts in federal forest counties receive federal forest aid in the place of state funds "to which the district[s] would otherwise be entitled." Wash. Rev. Code §28A.520.020(3). Using this federal aid, as Washington does, as a ***substitute*** for otherwise available state funds is the exact opposite of a "supplement."[11]

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[10] The Secure Rural Schools Act also mentions the then-expiring Omnibus Budget Reconciliation Act of 1993, but that Act simply set minimum payment amounts for the forest program and the O&CGLPA. It did not constitute a separate program.

[11] Indeed, when Congress intends to allow states to treat federal aid as a substitute for otherwise available state funding, it – to borrow the Ninth Circuit's misapplied phrase – "knows how to make its . . . distribution

What is more, the Ninth Circuit's construction of the Secure Rural Schools Act contravenes the structure of that Act. Congress passed the Act in 2000 because "[i]n recent years, the principal source of [federal forest and O&CGLP] revenues, Federal timber sales, has been sharply curtailed and . . . so too have the revenues shared with the affected counties." §2(a)(9). The Act stabilizes this federal aid by creating a system that guarantees certain minimum payments. Every two years, the Act gives "each affected county" the right to choose to receive either 25% of the proceeds from its local national forest or an alternate "safety net" amount. §§ 101, 102(a), 102(b)(1). Congress believed that these alternative payments "will provide a good source of funding for education for many rural schoolchildren across this county." App. 46a (statement of Rep. Turner).

But if the Ninth Circuit is correct that states may use federal forest payments as a *substitute* for otherwise available state aid, then Congress was simply wasting its time in passing a law to send additional assistance to schools in forest counties. Under the Ninth Circuit's interpretation of federal law, it makes no difference to the school districts in Washington's forest counties whether any minimum aid level exists or which method of funding their counties choose to accept. They get the same amount in combined federal and state funds regardless. The School Districts are not one penny better off than they were before Congress passed a law replenishing this waning federal element of their budgets. This absurd result cries out for review by this Court.

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preferences clear." App. 19a. The Impact Aid Act, which governs federal educational funding to areas impacted with certain federal activities, provides that when a state satisfies certain prerequisites, "payments under this subchapter for any fiscal year may be taken into consideration by such State in determining the relative . . . financial resources available to local educational agencies in that State." 20 U.S.C. §7709(d)(1). The federal forest aid program contains no such provision.

C. This Case Presents this Court's Only Opportunity to Consider this Issue Because the Two States that Have Offsetting Laws Both Reside in the Ninth Circuit.

It is crucial that this Court grant review in this case because, in all likelihood, it will not have another chance to revisit this issue. Over eighty-five percent of federal forest aid goes to states in the Ninth Circuit, and Oregon, the only other state that offsets this aid against otherwise available state funding, resides in that Circuit. *See supra* at 24 & n.8. Although the Ninth Circuit suggested at one point that Petitioners might be able to seek relief in Washington state courts, App. 10a, the Washington Supreme Court already has upheld an earlier version of the State's offsetting law. *See Caroll v. Bruno,* 499 P.2d 876 (Wash. 1972). Petitioners thus have nowhere else to turn for fulfillment of Congress' promise of improved educational facilities and opportunities.

It is regrettable that when faced with this weighty federal issue over which it effectively had exclusive jurisdiction, the Ninth Circuit issued a somewhat muddled and dismissive decision. But that court's failure to write a carefully reasoned opinion under these circumstances should counsel *in favor of* certiorari, not against it – especially when there can be no doubt that the opinion settles the pre-emption issue in that court and when even a cursory inspection of it reveals serious flaws in its analysis. Petitioners' right to benefit from the funds that Congress has earmarked for them is too important to let a decision stand that so obviously misconstrues the controlling federal statutes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEPHEN M. RUMMAGE
Counsel of Record
JEFFREY L. FISHER
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150

Attorneys for Petitioners

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OKANOGAN SCHOOL DISTRICT #105; OMAK SCHOOL DISTRICT #19; REPUBLIC SCHOOL DISTRICT #309; OROVILLE SCHOOL DISTRICT #410; TONASKET SCHOOL DISTRICT #404; QUILLAYUTER VALLEY SCHOOL DISTRICT #402; NESPELEM SCHOOL DISTRICT #14; STEPHEN KUNKEL; MARILE KUNKEL, individually and as guardians of Karen Kunkel, William Kunkel, Frank Kunkel, and Benjamin Kunkel; Methow Valley School District #350,

Plaintiffs-Appellants,

and

CUSICK SCHOOL DISTRICT # 59; WENATCHEE SCHOOL DISTRICT # 246; NEWPORT SCHOOL DISTRICT # 56; WHITE SALMON VALLEY SCHOOL DISTRICT # 405; CASCADE SCHOOL DISTRICT # 228; NORTH BEACH SCHOOL DISTRICT # 64; KETTLE FALLS SCHOOL DISTRICT # 212; ENTIAT SCHOOL DISTRICT # 127; HOQUIAM SCHOOL DISTRICT # 28; SEDRO WOOLLEY SCHOOL DISTRICT # 101; OKANOGAN COUNTY, a Washington municipal corporation,

Plaintiffs,

v.

No. 00-36096

D.C. No. CV-99-05654-RJB

OPINION

SUPERINTENDENT OF PUBLIC INSTRUCTION FOR THE STATE OF WASHINGTON; TREASURER FOR THE STATE OF WASHINGTON,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted
May 9, 2002 – Seattle, Washington

Filed June 3, 2002

Before: Pamela Ann Rymer, M. Margaret McKeown, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Rymer

COUNSEL

Jeffrey L. Fisher, Davis Wright Tremaine LLP, Seattle, Washington, for the plaintiffs-appellants.

David A. Stolier, Assistant Attorney General, Olympia, Washington, for the defendants-appellees.

OPINION

RYMER, Circuit Judge:

Since 1908 the federal government has paid states, such as Washington, twenty-five percent of all moneys received from national forests within their borders to be spent as the state legislature prescribes for the benefit of

public schools and public roads of counties in which a national forest is situated. 16 U.S.C. § 500. Washington distributes these funds to forest land counties, but has decided that forest land counties must disburse half of the money directly to school districts. The state then credits the amount of that disbursement toward the amount of state-mandated aid (called the basic education allocation, or BEA) that would otherwise be paid to the districts. Wash. Rev. Code § 28A.520.020.

Parents of children who attend the public schools in a forest land county and a number of school districts seek through this action under 42 U.S.C. § 1983 to restrain the Washington Superintendent of Public Instruction and the State Treasurer from reducing the districts' BEA in this way. They seek an order requiring them instead to pay school districts in forest land counties their full allocation of forest funds *and* their full basic education allocation. The district court held that neither the parents nor school districts have standing, and that the federal statute has not been violated in any event.

We agree that the school districts lack standing under *City of South Lake Tahoe v. California Tahoe Regional Planning Agency,* 625 F.2d 231 (9th Cir. 1980). School districts are a political subdivision of the state, and political subdivisions of a state may not challenge the validity of a state statute in federal court. Whether parents, in behalf of their children, have standing is a closer question. We conclude that they have sufficiently shown injury in fact, but that their ability to redress concerns about their children's education through the requested relief is problematic because the connection between § 500 and the quality of education delivered by any particular district is attenuated. In effect this leads us to the merits, for both

standing and the merits in this case turn on the unique way that § 500 structures the distribution of aid. Section 500 provides that federal forest funds are to be paid to the *state,* not to school districts. The statute does not constrain how the state exercises its discretion in spending those funds for the benefit of schools or roads in forest land counties, or control how the state (or a school district) uses its own funds in relation to the forest funds. Thus, the district court correctly entered judgment for the Superintendent and Treasurer.

I

Stephen and Marile Kunkel have four children who attend public school in the Okanogan School District.[1] The district is in a county that has forest land which belongs to the federal government. National forest property is not taxable by the county. Congress recognized the impact this would have on the ability of forest land counties to raise money for schools and roads, so it enacted § 500. *See* "The National Forest Management Act: Law of the Forest in the Year 2000," 21 *J. Land Resources & Envtl. L.* 151, 159 (2001). Section 500 provides:

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[1] Seventeen other school districts joined the suit originally, but only eight, including Okanogan, appeal. In addition to Okanogan, the parties on appeal are Republic School District # 309, Oroville School District # 410, Tonasket School District # 404, Omak School District # 19, Nespelem School District # 14, Quillayute Valley School District # 402, and Methow Valley School District # 350. All of these districts are similarly situated to Okanogan, which is the only one that we shall discuss specifically.

> [T]wenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State . . . in which such national forest is situated, to be expended as the State . . . legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: *Provided,* That when any national forest is in more than one State or Territory or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein.

16 U.S.C. § 500 (West 2000) (emphasis in original).

Washington has established a federal forest fund revolving account into which the treasurer deposits forest revenues for eligible counties. Wash. Rev. Code § 28A.520.020. Fifty percent of each forest land county's share is disbursed directly to the county to be spent as it chooses for public roads, public schools, or other public purposes authorized by federal law. This half is not at issue in this case. The other fifty percent goes through the county directly to school districts in the county, as authorized by the Superintendent of Public Instruction (SPI) according to a formula based on the number of full-time equivalent students in each district. It is this half about which the Kunkels and school districts complain.

Like all states, Washington's funding mechanism for public schools is complex. In broad strokes, each district is guaranteed a minimum level of funding through a general apportionment entitlement that pays for services and supports the district's basic education program. A district's "basic education allocation" is based on its annual average full-time equivalent enrollment and various adjustments,

including forest fund revenues received by the district. If a district is in a forest land county and its forest fund revenues are less than its BEA, the Superintendent apportions to the district the difference between the district's forest fund share and the BEA to which it would otherwise be entitled. Wash. Rev. Code § 28A.520.020(3). The Kunkels and Okanogan assert that the SPI should not be allowed to reduce the district's BEA by the amount of forest funds the district receives, because doing so deprives Okanogan schools of § 500 funding that is meant to compensate for the county's loss of a large part of its taxable land base.

The BEA is the largest component of school financing in Washington, but school districts may also levy taxes for support of maintenance and operation (a general fund levy), transportation, and facilities if authorized by sixty percent of the voters in the district.[2] Wash. Rev. Code § 84.52.053; Wash. Const. Art. VII, § 2(a). The state supplements maintenance and operation levy money by local effort assistance funds to help equalize local tax levy burdens.[3] Wash. Rev. Code § 28A.500.010. Finally, the

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[2] For example, voters in Okanogan School District passed a general fund levy in 1998 for $379,814 to be collected in 1999 and 2000. This amounted to $2.03 per $1,000 assessed valuation on property in the year 2000.

[3] These funds are available if the district has passed a levy equal to a state average hypothetical tax rate of 12 percent. Wash. Rev. Code § 28A.500.020. In 1998 Okanogan School District had a twelve percent levy rate of $3.744 compared with a state average of $1.471. In 1999-2000 it qualified for an additional $448,420 in state matching funds to go with the $379,814 it raised through its general fund levy. This meant that property owners in the district paid $2.03 per $1,000 of assessed valuation to collect $860,234 rather than $379,814.

state provides enhanced funding for small school districts. Wash. Rev. Code § 28A.150.260(1)(e).

Approximately 84 percent of Okanogan School District's annual funding comes from the state of Washington, 10 percent from the federal government, and 6 percent from local property tax levies. In fiscal year 1998-99, Okanogan's funding totaled $7,560,989.76. The district received $91,378.47 in federal forest revenues, which was added to $3,743,136.03 of BEA. Okanogan also received $379,505.96 in local effort assistance funds from the state, and raised $375,487.06 in local property taxes. The district budgets these resources in five expenditure categories: the General Fund, which is for staff salaries and benefits, classroom supplies and materials; the Debt Service Fund, which is used to pay down previous bond levies; the Capital Projects Fund, which is used to build and maintain facilities; the Transportation Vehicle Fund, which pays for buses; and the Associated Student Body Fund, to which students who wish to participate in extracurricular activities contribute $30 to defray program expenses such as travel and referees. The Kunkels believe that their children's education has been negatively impacted by the district's lack of funds, and that each child would benefit from better facilities and programs, more buses to reduce the time spent getting to and from school, and equipment that is up to date.

The Kunkels and Okanogan brought this suit to stop the state from reducing the school district's BEA by the amount of federal forest funds it receives. They also sought damages. The school district was dismissed on SPI's motion pursuant to Fed. R. Civ. P. 12(b)(6), as a political subdivision of the state may not challenge the validity of a state statute in federal court on federal

constitutional grounds; the claim of both parties for damages was dismissed because the Superintendent and the Treasurer are state actors and compensatory relief cannot be obtained against the state. On cross-motions for summary judgment, the district court held that the Kunkels lack standing because their injuries are generalized and not causally related to how the state factors forest funds into school financing. The court also concluded that the Kunkels are not within the zone of interests protected by § 500 because it extends to states, school districts and counties, not individuals, and that the problem posed by the Kunkels is a political one best resolved by the state legislature and Congress. Finally, the court did not believe that the Washington statute conflicts with the federal scheme or that the Supremacy Clause was implicated.

The Kunkels and Okanogan timely appealed.[4]

II

Okanogan contends that it satisfies the core requirements necessary for Article III standing because a forest

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[4] SPI disagrees with the assertion by Okanogan and the Kunkels that the district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) over a claim under § 1983 based on the Supremacy Clause. They cite *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979), as so holding. We see no reason to resolve this dispute as there is no doubt that the court had federal question jurisdiction pursuant to 28 U.S.C. § 1331, and that we have jurisdiction of the appeal pursuant to 28 U.S.C. § 1291. Likewise, we express no opinion on the suggestion in reply by the Kunkels and Okanogan that they have in any event stated a claim for relief under *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989).

fund school district is suffering an injury in fact through the state's withholding of the federal funds provided by § 500; the state is causing this injury by withholding the funds; and the relief requested would redress that injury by requiring the state to pass these funds on to the county for the school district's use. Okanogan acknowledges that we resolved the standing issue in *South Lake Tahoe,* but argues that we should decline to extend its holding to this case because Congress has specifically named *this* political subdivision as one of the beneficiaries of § 500. Alternatively, the district urges us to reconsider this issue en banc.

South Lake Tahoe controls. There we held that a political subdivision of a state, which a school district unquestionably is in Washington, may not challenge the validity of a state statute under the Fourteenth Amendment. *South Lake Tahoe,* 625 F.2d at 234; *Moses Lake School Dist. No. 161 v. Big Bend Comm'ty College,* 81 Wash. 2d 551, 556 (1972) (school district has power only from state legislature). We have declined to recognize an exception for Supremacy Clause claims, *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank,* 136 F.3d 1360, 1364 (9th Cir. 1998); *Palomar Pomerado Health Sys. v. Belshe,* 180 F.3d 1104, 1108 (9th Cir. 1999), and there is no reason to except Okanogan on account of anything in particular that § 500 has to say about school districts. To the contrary, to the extent that § 500 names beneficiaries at all, it names *states* and *counties.* It does not mention *school districts.*

Okanogan maintains that there must be some mechanism for enforcing its right to the benefit of § 500 funds, pointing out that in *Washington v. Federal Power Commission,* 207 F.2d 391 (9th Cir. 1953), we affirmed a judgment

in favor of the Commission – which had sided with the City of Tacoma, an arm of the State of Washington – in granting a license to build dams under the Federal Power Act that did not comply with state law. However, the issue there was whether a license applicant could act inconsistently with the declared policy of its creator, which we said it could; we had no occasion to consider whether the arm of the state could itself sue its creator in federal court to invalidate the state's policy. That is the issue we considered, and resolved, in *South Lake Tahoe.*

We are bound by *South Lake Tahoe,* regardless of whether its holding has since been questioned.[5] While school districts may challenge Washington's practice in state court, they lack standing to do so in federal court.

III

The Kunkels submit that they have standing because the state's practice of crediting Okanogan School District's BEA by the amount of its forest fund reserve reduces the money available to the district to spend on facilities and services. In their view, this has led to loss of class time for their children, and a lack of adequate staff and facilities. They argue that if Okanogan were to receive federal forest funds in addition to its full basic education allocation, the district's facilities and services would immediately benefit; this benefit would inure to *their* benefit, they say, because

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[5] *See, e.g., Indian-Oasis Baboquivari Unified Sch. Dist. v. Kirk,* 91 F.3d 1240 (9th Cir. 1996), *reh'g en banc granted,* 102 F.3d 999 (9th Cir. 1996), *appeal dismissed,* 109 F.3d 634 (9th Cir. 1997) (en banc); *Belshe,* 180 F.3d at 1110-11 (Hawkins, J., concurring); *Burbank-Glendale-Pasadena Airport,* 136 F.3d at 1365 (Kozinski, J., concurring).

no matter how the forest funds are used, the children would receive *a* benefit.[6]

The Kunkels' consternation at what they describe as Okanogan's "chronic lack of funds" is understandable, but it does not necessarily follow that their children's education will be positively affected if the state's practice of crediting the district's forest fund monies against the district's BEA were invalidated. To meet the constitutional minimum of standing, the Kunkels must show that they have suffered an invasion of a legally protected interest that is concrete and particularized; that their injury is fairly traceable to how SPI treats forest funds and not to the independent action of some third party not before the court; and that it is likely, as opposed to speculative, that the injury will be redressed by invalidating the state's practice. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). Prudential concerns also inform the question of standing. *Bennett v. Spear,* 520 U.S. 154, 162 (1997). In this connection we consider whether the Kunkels' grievance falls within the zone of interests protected by § 500, and whether it is particular to them or so generalized that it is more appropriately addressed to the political branches. *Allen v. Wright,* 468 U.S. 737, 751 (1984).

According to their evidence, the Kunkels' children have inadequate computer training, they lack science equipment and textbooks, and they are forced to spend time in transit from home to school and from one school to

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[6] The Kunkels pursued a theory of taxpayer standing in the district court, but not in their opening brief on appeal. We deem it abandoned. *See Milne v. Hillblom,* 165 F.3d 733, 737 n.6 (9th Cir. 1999).

another for music and physical education because the older facilities are unable to support such programs and the district has too few buses. Although SPI argues that this does not suffice because they have failed to show concrete educational harm by test scores or other objective measures, the Kunkels have shown that their children suffer some disadvantage in programs they participate in or facilities they use, *cf. Sierra Club v. Morton,* 405 U.S. 727, 735 (1972) (papers did not show that members used area or would be affected by the government's activities), and will continue to do so as all but one of them will be attending Okanogan schools for a number of years. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 112 (1983) (plaintiffs seeking injunctive relief must establish they are likely to suffer future injury from similar harms).

However, it is difficult to say that the deficiencies in program and facilities about which the Kunkels complain are caused by the state's practice of crediting forest fund reserves against the district's BEA rather than by too little funding in general, or would be redressed by changing it. As a practical matter, the amount of federal forest funds allocated to Okanogan for fiscal year 1998-99 – $91,378.47 – is a small part of the district's overall budget of $7,560,989.76. More importantly, there are several layers of discretion, and many decision-makers, between the distribution of federal forest monies by the state and the educational experience of the Kunkel children.

First there is the state. Under § 500, forest funds are not paid by the federal government to school districts or to schools, but to the state to be spent as the state legislature prescribes. Washington has chosen to split those funds fifty/fifty between forest land counties and school districts in forest land counties, which it does not have to do. It

could distribute all forest funds for public roads in forest land counties. Or disburse all forest funds to forest land counties, leaving apportionment among public roads, public schools, and public purposes entirely up to county legislative authorities. Or the state could change the formula by which local effort assistance is provided through matching funds. But assuming the present regime remains in place, nothing in § 500 precludes school boards and administrators from exercising their own discretion to spend funds, including funds from forest revenues, as they deem best.

Okanogan could use forest funds to hire more teachers or pay teachers more, pay down old debt, repair facilities, buy buses, or lower student fees for extracurricular activities. However, not all options would benefit the Kunkel children and even those that might, would have a remote effect at best. If, for example, the district were to apply an extra $91,378 to the Debt Service Fund, taxpayers – but not students – would primarily benefit. The Kunkels say their children will participate in extracurricular activities regardless of the fee. The evidence shows that only 6.85 percent of the General Fund goes for materials and supplies, and the only capital projects on Okanogan's radar screen are repairs to the bus barn and vocational school. Only adults use the bus barn and the Kunkel children express no interest in taking shop or other classes in the vocational building. Were the district to add buses, the children's ride might be shortened by a few minutes yet there is no showing that this would improve the quality of their education. In short, the school district is an independent actor with the final say on budgeting for schools attended by the Kunkel's children.

Not only do these factors raise serious questions about constitutional standing, but prudential principles are implicated as well. For to the extent that § 500 directs forest funds only to the state, to be spent in its discretion for the benefit of public schools and roads in forest land counties, the Kunkels' dispute with SPI arguably falls outside the zone of interests protected by the federal statute and raises instead a general issue about how the state should distribute its education dollars. This may affect those who live in non-forest land counties as well. If so, it is a problem most appropriately addressed to the Washington legislature or Congress.

These standing concerns come into better focus when the Kunkels' position on the merits is considered. They contend that Congressional intent could not be clearer: federal forest funds are to be spent "for the benefit of the public schools . . . of the county or counties" in which the revenues are generated. From this they infer that Congress intended to benefit particular counties, not the state as a whole, and that Washington's practice conflicts with this overriding purpose because the state deducts one hundred percent of the federal forest funds from the school district's BEA. Specific counties, their schools, roads and citizens cannot benefit, or receive any advantage, from forest funds which they do not receive, the Kunkels submit. Rather, they maintain, the only benefit or advantage of the federal funds under Washington's system goes to the state.

The difficulty with the Kunkels' argument is that § 500 on its face directs forest funds to the *state* and permits them to be expended as the *state legislature may prescribe* for the benefit of public roads *or* schools of forest land counties. By its terms, no state is obliged to spend

any forest fund money for schools. The Supreme Court made this clear early on, when it confirmed in *King County v. Seattle School Dist. No. 1,* 263 U.S. 361, 364-65 (1923), that Congress accorded the states great discretion in distributing federal forest funds and that the states may use these moneys for public roads *or* schools as the state deems best.[7]

Section 500 differs in this respect from legislation that specifically provides for payments to school districts. *See, e.g., Shepheard v. Godwin,* 280 F. Supp. 869 (E.D. Va. 1968) (construing Federal Impact Aid Act, now codified at 20 U.S.C. § 7703, (West.2001), which pays funds directly to school districts burdened by the federal government's acquisition of property within the district); *cf. Carroll v. Bruno,* 81 Wash. 2d 82, 86 (1972) (distinguishing impact aid cases and upholding Washington's scheme for distributing § 500 funds against challenge by school districts). The forest fund statute also differs from the text of statutes providing for similar programs but expressly stipulating that the state is to use federal aid only to supplement the amount of funds that would be available from non-federal sources, not to supplant them. *See, e.g.,* Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(18)(C) ("funds paid to a State under this subchapter will be used

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[7] The Kunkels rely on two state court decisions for the proposition that the states are constrained to exercise their discretion in conformity with the purposes of the statute. However, neither *Eminence R-1 Sch. Dist. v. J.D. Hodge,* 635 S.W.2d 10 (Mo. 1982), nor *Trinity Independent School District v. Walker County,* 287 S.W.2d 717 (Tex. Civ. App. 1956), suggests that states lack freedom to choose between schools and roads or cannot exercise their own judgment in allocating between them for forest land counties.

to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) . . . and in no case to supplant such Federal State, and local funds . . . "); Improving America's Schools Act of 1994, 20 U.S.C. § 6322(b)(1)(A) (1995) ("A state or local educational agency shall use funds received under this part only to supplement the amount of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds."). These differences indicate that Congress knows how to direct funds to school districts, and to make its distribution preferences clear when it wants to.

Congress has left § 500 intact, adding no such conditions to receipt of forest funds. Even though the Kunkels recognize that the text of § 500 hasn't changed, they argue that the Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. 106-393, §§ 2(a)(3)-(6), 2(b)(1), 114 Stat. 1607 (2000), clarifies that § 500 means that forest funds are intended to supplement, not supplant, other funds available to school districts. This Act consolidates a number of federal aid programs, including § 500, in order to secure minimum payment levels for the future. The Kunkels point in particular to subsections 2(a)(3)-(6), and (2)(b)(1). In these paragraphs, Congress finds (as it did in 1908) that some measure of compensation is appropriate for forest land counties for the benefit of public schools and roads; and articulates that one of the purposes of the 2000 Act is "to stabilize payments to counties to provide funding for schools and roads that supplements other available funds." § 2(b)(1). While this purpose appropriately reflects what Congress intends with

respect to statutes that so provide, § 500 itself contains no such declaration. There is no way that it can be read as requiring that forest funds go to school districts, let alone that if they do, they can only be used to augment money that the state – or the district – might otherwise be able to provide.

The bottom line is that § 500 allows the Washington legislature to decide how to spend federal forest funds for the benefit of public schools or roads in forest land counties, and its decision to apportion some of those funds directly to school districts in forest land counties comports with § 500. Section 500 does not constrain how the state allocates its own money, or how school districts spend theirs. We therefore affirm dismissal of the school districts, and judgment for the Treasurer and SPI on the Kunkels' claim for relief.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

OKANOGAN SCHOOL DISTRICT 105, et al., Plaintiffs, v. The SUPERINTENDENT OF PUBLIC INSTRUCTION for the STATE OF WASHINGTON; and The TREASURER for the STATE OF WASHINGTON, Defendants.	Case No. C99-5654RJB ORDER (Filed May 5, 2000)

This matter comes before the court on Defendants' CR12 Motions to Dismiss and for Judgment on the Pleadings (Dkt. #16). The court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

STANDARD OF CONSIDERATION FOR MOTION TO DISMISS

On a motion to dismiss, all allegations of material fact are taken as true and are construed in the light most favorable to the plaintiffs. *SmileCare Dental Group v. Delta Dental Plan of California*, 88 F.3d 780, 783 (9th Cir. 1996). The court should not dismiss a complaint unless it appears beyond doubt that the plaintiffs can not prove a set of facts in support of their claims that would entitle them to relief. *Id.* at 783. Conclusory allegations of law and unwarranted inferences are insufficient to defeat a

motion to dismiss for failure to state a claim. *In re Veri-Fone Sec. Litig.* 11 F.3d 865, 868 (9th Cir. 1993).

FACTUAL BACKGROUND

The plaintiffs are eighteen school districts one county, and two private citizens, alleging that the Washington state system for allocation of funds for public school violates the Supremacy Clause of the U. S. Constitution. The plaintiffs bring their claims pursuant to 42 U.S.C. § 1983 and 16 U.S.C. § 500. The plaintiffs seek declaratory and injunctive relief, and damages for retroactive payment of funds received by the state from the federal government.

The defendants are the Superintendent of Public Instruction and the State Treasurer. The defendants bring this motion to dismiss, arguing that the court lacks subject matter jurisdiction and the claims brought by the plaintiffs are non-justiciable. The defendants seek a judgment in their favor on the pleadings.

ISSUES

The issues brought by this motion are:

1) Whether the plaintiffs county and school districts have standing to sue the state.

2) Whether sovereign immunity under the Eleventh Amendment bars the plaintiffs' claims.

3) Whether the plaintiffs have stated claims for relief under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(a)(3).

Because of the court's ruling on the first issue, the remaining issues will not be addressed.

DISCUSSION

1) Whether the plaintiff county and school districts have standing to sue the state.

The defendants argue that, as political subdivisions, the plaintiffs cannot challenge the validity of a state statute in federal court on constitutional grounds.

The plaintiffs raise three arguments to counter the defendant's motion on this issue: 1) Plaintiff Okanogan County is an independent legal entity and not a "creature" of the state; 2) similar litigation has been allowed in the Ninth Circuit; and 3) the rationale forbidding a political subdivision from challenging a state statute does not apply to this case.

It is well-settled that "[s]tanding is a necessary element of federal-court jurisdiction." *Palomar Pomerado Health System v. Belshe*, 180 F.3d 1104, 1107 (9th Cir. 1999). "Under established Ninth Circuit law, political subdivisions of a state may not challenge the validity of a state statute in a federal court on federal constitutional grounds." *Id.* (citation and internal quotation omitted). To determine if the plaintiffs have standing, the court must determine (1) whether the plaintiffs are "political subdivisions" of the State of Washington and if so, (2) whether, by suing the defendants, the plaintiffs bring their claims against the state. *Id.* (citations omitted). *See also Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360 (9th Cir. 1996); *City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 625 F.2d 231 (9th Cir. 1980).

As to the first factor, the plaintiffs argue that they are not political subdivisions. They point out that the state's power over counties is extremely limited by citing to Article II, Sections 3 and 4 of the Washington State Constitution. These sections pertains [sic] to a county's right to local self-government and to the state's limited ability to strike territory from a county. From these sections, the plaintiffs argue that the county's existence cannot be removed by state legislative action. Finally, the plaintiffs cite to other circuit case law which does allow political subdivisions such as counties and school districts to sue the state.

The defendants cite *State of Washington v. Vantage Bridge Co.*, 134 Wash. 568, 572 (1925), which held that counties are local subdivisions of the state and are created by the sovereign power of the state without consent or action by the persons who reside within the counties. *See also Mochizuki v. King County*, 15 Wash.App. 296, 297-98 (1976). As for school districts, the defendants cite *Moses Lake School Dist. 161 v. Big Bend Comm'ty College*, 81 Wash.2d 377, 556 (1972) which held that school districts exist "solely for public purposes and may exercise only those powers expressly granted by the legislature, those necessarily implied or incident to the powers granted, and those essential to the legislature's declared purpose . . . " *Id.*

Based on the authorities cited by the defendants, it is clear to the court that both counties and school districts are political subdivisions of the state. The court will not accept the plaintiffs' invitation to apply the rule of circuits other than the Ninth Circuit.

As to the second part of the test, the court must determine if the named defendants are actually state actors. Generally, relief sought against state officers is relief sought against the state if a judgment would operate against the state. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984).

Here, the plaintiffs argue that the forest fund money comes from the federal government. Any judgment in their favor would affect only that money and not affect any state money. The defendants contend that both the Treasurer and the Superintendent of Public Instruction are officers established by the Washington State Constitution in the Executive Branch. See Article III, Sections 1, 19 and 22 of the Washington State Constitution.

Based on the authorities presented by the defendants, it appears clear to the court that any judgment against the named defendants would be the same as a judgment against the state. These individuals hold offices created by the state for the operation of political subdivisions. For the reasons stated by the defendants, the named defendants are agents of the state. The plaintiffs lack standing to sue the defendants in federal court. This ruling should not be construed to be a bar to bring this action in state court, if appropriate.

The defendants' motion to dismiss should be granted. The plaintiffs' complaint should be dismissed without prejudice to bring this action in state court, if appropriate.

Therefore, it is hereby

ORDERED that Defendants' CR12 Motions to Dismiss and for Judgment on the Pleadings (Dkt. #16) is **GRANTED**. The plaintiffs' complaint ~~should be~~ is [RJB]

dismissed without prejudice to bring this action in state court, if appropriate.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any part appearing *pro se* at said party's last known address.

DATED this 5 day of May, 2000.

/s/ Robert J. Bryan
Robert J. Bryan
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

OKANOGAN SCHOOL DISTRICT #105 et al., Plaintiffs, v. THE SUPERINTENDENT OF PUBLIC INSTRUCTION for the STATE OF WASHINGTON; THE TREASURER for the STATE OF WASHINGTON, Defendants.	Case No. C99-5654RJB ORDER GRANTING JOINT MOTION FOR CLARIFICATION (Filed May 23, 2000)

This matter comes before the court on Joint Motion for Clarification (Dkt. #23). The court has considered the pleadings filed in support of the motion and the file herein.

The parties jointly seek clarification of the court's Order (Dkt. #21, entered on May 5, 2000) granting the Defendants' Motions to Dismiss and for Judgment on the Pleadings (Dkt. #16), and dismissing the plaintiffs' complaint. The parties contend that the plaintiffs' claims for prospective injunctive and declaratory relief should not be included in the court's order of dismissal since those claims were not included in the defendants' motions.

On review of the record, the parties are correct. The court's Order (Dkt. #21, entered on May 5, 2000) should be clarified to state that the plaintiffs' claims for prospective injunctive and declaratory relief is not included

in the order to dismiss. Those claims should be reinstated in this court.

Therefore, it is hereby

ORDERED that Joint Motion for Clarification (Dkt. #23) is **GRANTED**. The plaintiffs' claims for prospective injunctive and declaratory relief are hereby **REINSTATED** in this court, and the Minute Order Setting Trial, Pretrial Dates and Ordering Mediation (Dkt. #15) remains in full force and effect. The Clerk shall issue an Amended Judgment.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 23d day of May, 2000.

/s/ Robert J. Bryan
Robert J. Bryan
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

OKANOGAN SCHOOL DISTRICT #105, et al., Plaintiff, v. THE SUPERINTENDENT OF PUBLIC INSTRUCTION for the STATE OF WASHINGTON; and THE TREASURER for the STATE OF WASHINGTON, Defendants,	Docket No. C99-5654 Tacoma, Washington November 16, 2000

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ROBERT J. BRYAN
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: MARY KATE LEHMAN
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688

For the Defendants: DAVID A. STOLIER
Assistant Attorney General
1125 Washington Street Southeast
Post Office Box 40100
Olympia, Washington 98504-0100

Court Reporter: Julaine V. Ryen
Post Office Box 885
Tacoma, Washington 98401-0885
(253) 593-6591

Proceedings recorded by mechanical stenography, transcript produced by Reporter on computer.

* * *

[17] THE COURT: I think I should consider and rule on the substantive issues here before the procedural standing issue.

It's interesting to me always to look at Washington cases that, of course, don't bind this court. They don't have [18] precedential value, but are of interest, and sometimes are persuasive. I think *Carroll v. Bruno* is basically on all fours. I understand that the circumstances have changed in regard to the 85 percent, 100 percent, and so forth. I think that's a distinction without a difference.

What's interesting about – or a thing that's interesting about *Carroll v. Bruno* is that all of the people involved in that case, with the exception of Mr. Patterson, who is an Assistant Attorney General, but all the rest of them are friends of mine. The trial judge, I encouraged that he throw his hat in the ring. He is junior to me on the state court by a few years. The plaintiffs' lawyers, or appellants' lawyers, are both friends of mine. And Senator Gorton, then attorney general, is a friend, and all nine members of the Supreme Court were all friends of mine and I worked with them on many things and sat with most of them on the Supreme Court as a pro tem. That's beside the point. It's just a matter of interest of history, I guess. When you get old, you will have the same kinds of memories.

Judge Hale in that opinion sort of blew off the supremacy issue, and they all went along with it. That's not binding on this court, as I say, but I think basically what we have here in regard to the supremacy issue is a situation

where the state, the state scheme, statutory scheme for handling these funds is not in violation of 16 United States Code, section 500. [19] Obviously, one does not take lightly the request to set aside a state legislative scheme in favor of a federal constitutional provision. If the supremacy clause and the state scheme can both be read to have value, that is a better result than a head-on collision.

The supremacy clause, found in Article VI of the Federal Constitution, does indicate that federal law is the supreme law of the land, and the judges in the states are bound thereby.

Looking at section 500 of 16 United States Code, it seems to me that you – it's really not helpful to go beyond the four corners of that statute to try and find some meaning and some legislator's intent, some congressman's intent, back in 1908. It means what it says.

What is the underlying purpose of it? In my opinion the purpose of it was to prevent counties and schools and roads in those counties from being adversely affected by the fact that some of their, what would otherwise be taxable property, is taken up by the federal government in the nature of national forest. It was not to provide an extra benefit to those counties, but to provide a benefit to them to prevent them from being shortchanged by this situation.

The state's scheme provides that the money go to those, to the credit of the schools and public roads in the counties affected. It does do that. The state has then seen fit to take that into consideration in their other funding formulas, and I [20] think they can do that under this statute. If in some way a county was being unfairly treated by this scheme, we could have a different situation, but the

fact of the matter is that each county, and I guess each school district, is treated equally by the state, considering the fact that some have these funds, some get impact funds under a different scheme, and so forth. But I think it's within the statute, the federal statute, and within the power of the state to do what the state has done in this circumstance.

I am persuaded in part by the fact that in other circumstances with so-called federal impact funds, different language is used that clarifies this issue, and I am also, I guess, impressed with the fact that the, what I conceive to be the purpose of this statute, to prevent harm to counties with forest, federal forests in them, I think the intent of the statute is met by this scheme.

I guess, in the same way as Judge Hale, I blow off the – or Justice Hale. They were judges, incidentally, until the Court of Appeals came along, and they decided – they, the Supreme Court decided – after that they were justices. I don't know when the Court of Appeals started, but it was about that time. But I just don't see a violation of the supremacy clause here. I think this scheme is within the scope of what is permissible under the federal statute. To that extent, I guess, I'm blowing off that supremacy argument in about the same way as Judge Hale [21] did, but based on the federal point of view rather than the state.

Let me address this standing issue. In light of what I have just said, it may not be necessary to address it, but I think it's appropriate to address it, and there are a couple of things I want to say about it.

I think the injury that the Kunkels, the Kunkel family, faces here or has suffered here is not a concrete

and particularized interest. I think it is not more than a conjectural or hypothetical interest. I think it's highly speculative to draw a causal connection between this financing scheme and the injury that they complain of, and it's highly doubtful that a ruling in favor of the plaintiffs here will fix the school funding problem for the Kunkel family. They do have an interest in this matter, certainly, as all parents do and as all children do in this state, but the zone of interest that is protected by the statute in question, I think, goes to school districts and counties and the state and is not intended to protect individual citizens in their individual capacity.

I think – and this is perhaps the most important thing – I think this is a generalized grievance shared substantially by all citizens, not just those in the Okanogan district or the school districts with forest funds available to them, but it's a grievance that is shared in a substantially equal measure by every student in the state and every school district in the [22] state. There's not a one who says they have enough money to do the job they think they ought to do. Each district has different problems, and each district deals with those problems in different ways. But they are substantially the same grievance, I think, throughout the state and throughout all school districts, and are not substantially different in the Kunkel's district as in any other. So I think they don't have standing here to raise this issue.

Now, let me say something else about that that I think is very important.

This is, in my view, a political issue. The Kunkels have standing to raise political issues in the appropriate forum. The appropriate forum, in my judgment, is not the

court, but the state legislature and the United States Congress. The Kunkels have full standing, along with every other citizen, to raise these issues and to fix this law if they believe it to be unfair.

So when one says in this kind of a case that a party does not have standing, it doesn't mean that they don't have standing to fix the problem. An example is Tim Eyman, who seems to be fixing problems that I didn't know he had. But the power of the individual in the legislative process at both the federal congressional level and the state level is a powerful one, and it can be powerful. It's not easy to fight city hall or change the law, but it can be done, and that's the forum, I think, that [23] this issue should be addressed in.

I would only say one other thing, and that is that I think that if the plaintiffs' argument regarding the supremacy clause were correct, it would not protect – not simply protect these counties from harm, but give them an extra benefit beyond what all other school districts in the state had, and arguably give the children in the districts a benefit beyond that that students in nonforest, federal forest counties would have available to them. I just simply think that's not the intent of the statute. To use Ms. Layman's example, I think it would overflow the glass to rule in favor of the plaintiffs on the supremacy issue.

For those reasons, it's my judgment that the defendants' motion for summary judgment of dismissal should be granted, the plaintiffs' motion for summary judgment should be denied.

In regard to those motions, I should say that we are dealing with legal issues here. The facts are not in dispute, and I think there are no material issues of fact that would

require a hearing or trial, and therefore the trial should also be stricken.

That's what I think.

All right. Jean will enter an order referring to these brief remarks, and thank you. I should say she will enter judgment, and so things like appeal time start running as soon as she files it, so she will know when it is.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

OKANOGAN SCHOOL DISTRICT 105, et al., Plaintiff, v. THE SUPERINTENDENT OF PUBLIC INSTRUCTION for the STATE OF WASHINGTON, et al., Defendant.	CASE NO. C99-5654RJB MINUTE ORDER (Filed Nov. 16, 2000)

NOW, on this 16th day of November, 2000, the Court directs the Clerk to enter the following Minute Order:

ORAL ARGUMENT was conducted this day and for the reasons stated orally, by the Court, Defendant Treasurer of the State of Washington's Motion for Summary Judgment (dkt #25) is **GRANTED** and Plaintiff Mehtow Valley School's Motion for Summary Judgment (dkt #28) is **DENIED**.

This case is closed and the trial date is stricken.

The foregoing Minute Order entered by Jean Boring, Deputy Clerk, BY DIRECTION OF THE HONORABLE ROBERT J. BRYAN, UNITED STATES DISTRICT JUDGE.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OKANOGAN SCHOOL DISTRICT #105; OMAK SCHOOL DISTRICT #19; REPUBLIC SCHOOL DISTRICT #309; OROVILLE SCHOOL DISTRICT #410; TONASKET SCHOOL DISTRICT #404; QUILLAYUTE VALLEY SCHOOL DISTRICT #402; NESPELEM SCHOOL DISTRICT #14; STEPHEN KUNKEL; MARILE KUNKEL, individually and as guardians of Karen Kunkel, William Kunkel, Frank Kunkel, and Benjamin Kunkel; METHOW VALLEY SCHOOL DISTRICT #350,	No. 00-36096 D.C. No. CV-99-05654-RJB ORDER (Filed Jul. 15, 2002)
Plaintiffs-Appellants,	
and	
CUSICK SCHOOL DISTRICT # 59; WENATCHEE SCHOOL DISTRICT # 246; NEWPORT SCHOOL DISTRICT # 56; WHITE SALMON VALLEY SCHOOL DISTRICT # 405; CASCADE SCHOOL DISTRICT # 228; NORTH BEACH SCHOOL DISTRICT # 64; KETTLE FALLS SCHOOL DISTRICT # 212; ENTIAT SCHOOL DISTRICT # 127; HOQUIAM SCHOOL DISTRICT	

# 28; SEDRO WOOLLEY SCHOOL DISTRICT # 101; OKANOGAN COUNTY, a Washington municipal corporation	)
Plaintiffs,	)
v.	)
SUPERINTENDENT OF PUBLIC INSTRUCTION FOR THE STATE OF WASHINGTON; TREASURER FOR THE STATE OF WASHINGTON,	)
Defendants-Appellees	)

Before: RYMER, McKEOWN, and GOULD, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

WASHINGTON, TUESDAY,
Vol. 146 OCTOBER 10, 2000 No. 125

Congressional Record

[LOGO]

United States
of America

PROCEEDINGS AND DEBATES OF
THE 106th CONGRESS, SECOND SESSION

SECURE RURAL SCHOOLS AND COMMUNITY SELF-DETERMINATION ACT OF 2000

Mr. GOODLATTE. Mr. Speaker, I move to suspend the rules and concur in the Senate amendment to the bill (H.R. 2389) to restore stability and predictability to the annual payments made to States and counties containing National Forest System lands and public domain lands managed by the Bureau of Land Management for use by the counties for the benefit of public schools, roads, and other purposes.

[Text of proposed act omitted]

* * *

The SPEAKER pro tempore. Pursuant to the rule, the gentleman from Virginia (Mr. GOODLATTE) and the gentleman from Texas (Mr. STENHOLM) each will control 20 minutes.

The Chair recognizes the gentleman from Virginia (Mr. GOODLATTE).

GENERAL LEAVE

Mr. GOODLATTE. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days within which to revise and extend their remarks on H.R. 2389, the bill now under consideration.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Virginia?

There was no objection.

Mr. GOODLATTE. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in strong support of H.R. 2389, the Secure Rural Schools and Community Self-Determination Act of 2000. I want to particularly commend the gentleman from Florida (Mr. BOYD), the gentleman from Georgia (Mr. DEAL), the gentleman from Oregon (Mr. DEFAZIO), and the chairman of our committee, the gentleman from Texas (Mr. COMBEST), as well as the ranking member, the gentleman from Texas (Mr. STENHOLM), for their dedicated efforts on this legislation.

I would also like to particularly single out members of the staff of my subcommittee, Dave Terry, of the full committee, and Brent Gattis of my subcommittee, and Kevin Kramp, formerly of my subcommittee, as well the staff on the Democratic side for very, very long, dedicated work to get this legislation to this point.

This bill is landmark policy on two important fronts. First, it provides critical funding for schoolchildren in hundreds of rural communities all over America who have been left behind by the policies of their own government.

Second, it creates a new paradigm for local citizen participation in the management of our Federal forest lands.

In 1908, our government made a promise to the people who live in and around our Federal forests. The government promised to share the economic bounty of these lands with the local people to sustain their schools, their communities, and their way of life. This was a contract to compensate these communities for the economic opportunities lost because the Federal Government owned most of the land.

Now, 90 years later, the government has defaulted on this promise and rural communities all over America are suffering. Federal policies have eliminated the economic bounty from our Federal forest lands. As a result, schools have cut their services to the bone and, in some cases, closed their doors all together for lack of funding.

Families have been torn apart as parents are forced to work farther and farther from home. Local infrastructure has disintegrated; and, sadly, the primary victims of this tragedy have been schoolchildren, children who have been left behind by their government while the rest of America prospers.

The purpose of H.R. 2389 is to correct this wrong. By shoring up Federal payments to rural forest communities, this legislation restores our government's commitment to education in rural forest communities. Significantly, and this is a very important point in this time of intense debate on education in our country, the commitments made to education in this bill come without strings attached.

That means when a county in Oregon or Arkansas or Pennsylvania or Florida receives Federal support for education under this bill, the local community, not the Federal Government, will determine how that funding is best used. If local schools need books, they can buy books. If they need additional teachers, they can hire them. If they need to fix the roof on a school, they can do it. This philosophy of Federal support coupled with local decision-making should be a model for the Congress as we work to improve education in our country.

H.R. 2389 also changes the way we approach Federal forest management. For the first time, local communities will have a direct stake in the management of our national forests. This has been one of the worst wildfire seasons of the century, and the experts tell us that the worst may be yet to come. This bill provides critical funding that counties can leverage with private investments and Federal appropriations to address fire risk head on.

Counties can also use this funding to restore watersheds, improve fish and wildlife habitat, and enhance the overall health of our forests. It establishes a framework for local collaboration that, if successful, will replace the current centralized command and control policy with a new and effective way to resolve forest management issues at the local level using local expertise.

I urge the Members of this body to join me in taking this important step today by sending H.R. 2389 to the President's desk. We can renew the promise made to our rural forest communities back in 1908. We can raise the hopes of rural school children all over America and begin the process in earnest of helping them rebuild their homes

and communities. Join me in declaring a strong commitment to rural schools and rural communities. Vote in favor of this legislation.

Mr. Speaker, I reserve the balance of my time.

Mr. STENHOLM. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in support of H.R. 2389, the Secure Rural Schools and Communities Self-Determination Act of 2000. H.R. 2389, when signed by the President, will set in motion significant improvements in the manner that the Federal Government fulfills its financial commitment to rural counties located within the boundaries of our national forest system.

The fulfillment of this commitment is even more critical today where the county payments have declined considerably as a result of major forest resource management policy changes. After 2 years of hard work, we have before us compromise legislation that maintains the core components of the Federal Government's payments system for forest counties.

Mr. Speaker, the manner in which this Congress continues these payments is critical to the future well-being of national forest health and the economic stability of rural communities. This compromise legislation is a step in the right direction. I urge all of my colleagues to support final passage.

Mr. Speaker, I reserve the balance of my time.

Mr. GOODLATTE. Mr. Speaker, I yield 1 minute to the gentleman from Oregon (Mr. WALDEN), who has also been a significant contributor to this effort.

(Mr. Walden of Oregon asked and was given permission to revise and extend his remarks.)

Mr. WALDEN of Oregon. Mr. Speaker, I thank the gentleman for yielding me this time, and I want to commend the gentleman from Virginia and the gentleman from Texas, as well as my colleagues from Oregon, in putting together this very important legislation that will help our school children and our counties who have been hurt tremendously by changes in Federal policy.

Since 1908, rural counties adjacent to Forest Service and BLM forest lands have received Federal funds for schools and roads based on the revenue received from land management activities. Over the last decade, as a result of sharp declines in revenues from these Federal forest lands, many of these counties have been unable to fund essential programs for their kids and to take care of their road maintenance and infrastructure.

Mr. Speaker, this legislation goes a long way toward resolving that problem and toward making the Federal Government a better neighbor and certainly a better partner in the health of our communities in rural America. I urge passage of this legislation.

Mr. STENHOLM. Mr. Speaker, I yield such time as she may consume to the gentlewoman from North Carolina (Mrs. CLAYTON.)

Mrs. CLAYTON. Mr. Speaker, I thank the gentleman from Texas for yielding me this time and for his leadership, as well as the gentleman from Virginia (Mr. GOODLATTE) for his leadership.

Mr. Speaker, this is an opportunity to speak on a subject which is dear to my heart, H.R. 2389, the Secure

Rural Schools and Community Self-Determination Act of 2000. We have spoken extensively about our priorities to make schools safer, with smaller class sizes, skilled teachers, the latest technology, excellent school facilities with the proper books, lunch programs, and extracurricular activities. Yet we have witnessed many schools lacking the funds needed to improve our schools.

I not only live in rural America, but I represent a district which is predominantly rural. I am aware of great challenges counties face in providing adequate funding for their schools. We know that in addition to love and care from family members, schools are the foundation for developing successful young people and strong vibrant economies.

For decades now, counties received a 25 percent revenue from forest receipts. These funds were used to help make their schools successful. Unfortunately, these receipts have gradually dwindled. Federal forest receipts in some counties have dropped more than 90 percent. This decline has severely impacted the quality of education provided in the affected rural counties. Many schools have been forced to do just the opposite of what we were hoping to achieve: many teachers have been laid off, and bus drivers, nurses and other employees have also faced a similar fate.

We need to support H.R. 2389. A "yes" vote on H.R. 2389 will assist these communities in providing an equitable and stable source of funding in rural settings. By supporting this measure, we can be assured we are doing all we can to assist communities by providing an equitable and stable source of funding for schools in and near our forest areas.

Mr. STENHOLM. Mr. Speaker, I yield such time as he may consume to the gentleman from Oregon (Mr. DEFAZIO).

(Mr. DEFAZIO asked and was given permission to revise and extend his remarks.)

Mr. DEFAZIO. Mr. Speaker, I rise in strong support of this long-awaited vital legislation for our counties and schools.

I congratulate and thank all those who have been involved in this landmark legislation. I urge my colleagues to support this and send it to the President for his signature.

Mr. STENHOLM. Mr. Speaker, I yield such time as he may consume to the gentleman from Florida (Mr. BOYD).

(Mr. BOYD asked and was given permission to revise and extend his remarks.)

Mr. BOYD. Mr. Speaker, I thank the gentleman from Texas (Mr. STENHOLM), and also my partner, the gentleman from Virginia, the chairman of the subcommittee, for his skill in which he has managed this legislation.

Mr. Speaker, make no mistake that this is an education bill, a rural education bill that is very important to many, many communities around the country, including some communities in north Florida.

As we have heard described here today, a compact was made in 1908 with these communities when the forest lands were put into the ownership of the Federal Government, and that compact has been broken. This legislation

will fix that compact again and make it work like it is supposed to.

I know in my particular area, the way that compact was broken was the fact that the Forest Service began to manage their timberlands in a different way because of the protection of the habitat for the endangered red cockaded woodpecker. The revenues to our local school districts in those forest communities declined by as much as 90 percent. So this, again, will go a long ways toward correcting that.

I want to give a word of thanks to our partners who have helped us here. Again, the gentleman from Virginia (Mr. GOODLATTE), the gentleman from Georgia (Mr. DEAL), who was an original cosponsor of this legislation with myself, also the gentleman from Oregon (Mr. DEFAZIO), the gentleman from Texas (Mr. TURNER), the gentleman from California (Mr. GEORGE.MILLER), the gentlewoman from North Carolina (Mrs. CLAYTON), and the gentleman from Texas (Mr. STENHOLM).

Also, Mr. Speaker, I want to take this opportunity to thank the staff members who have done a wonderful job of negotiating some very difficult and complex negotiations with the Senate and the administration in the last 10 days. That is Dave Tenny, Brent Gattis, and Quinton Robinson, from the House Committee on Agriculture; Doug Crandall from the House Committee on Resources; Penny Dodge and Amelia Jenkins with the office of the gentleman from Oregon (Mr. DEFAZIO); Trent Ashby with the office of the gentleman from Texas (Mr. TURNER); Tom Pyle with the majority whip's office; and Chris Schloesser from my own staff.

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I also want to thank the chairman of the National Forest Counties and Schools Coalition, Mr. Bob Douglas, whose group certainly provided impetus for us to get to this point today. And I also want to thank my own superintendent of schools in Liberty County, Florida, who has been a leader for me in this, Mr. Hal Summers.

Mr. STENHOLM. Mr. Speaker, I yield such time as he may consume to the gentleman from Texas (Mr. TURNER).

Mr. TURNER. Mr. Speaker, it is an honor to rise in support of this legislation this evening. I join in the remarks of those who preceded me. I thank each Member on the floor who has worked so hard to bring this bill to fruition.

I particularly want to thank the National Forest Counties and Schools Coalition, that coalition of over 1,000 rural education, government, and business leaders, who worked hard to put this legislation together. That coalition included groups like the National Education Association, the U.S. Chamber of Commerce, the American Association of School Administrators, and the National Association of Counties.

Many representatives and community leaders from across the country have come to Washington to work on this bill over the last several months. Two of them are good examples from my district, my own county judge, Chris Vanderhof, and Trinity County Judge Mark Evans, who served on the National Coalition.

This is a good bill. It returns stability to the funds that flow to over 700 counties across this country that have national forest lands within their boundaries. It

means a lot to the school districts in those counties. This will return some stability to their flow of funds, and it will provide a good source of funding for education for many rural school children across this country. I urge adoption of this legislation.

Mr. STENHOLM. Mr. Speaker, I yield such time as she may consume to the gentlewoman from Oregon (Ms. HOOLEY).

Ms. HOOLEY of Oregon. Mr. Speaker, I too would like to thank my colleagues for all of their hard work on this piece of legislation. I rise in strong support of H.R. 2389.

The children in my district in Oregon and the children in over 800 counties across the rest of the United States are being shortchanged. People in Oregon and across the United States that live in rural areas with vast amounts of Federal land depend on payments from the Federal Government.

Unfortunately, these payments have decreased in recent years; and, as a consequence, education programs and county services have been subjected to massive budget cuts.

Over the last 10 years, I have seen class sizes grow while teachers, buses, music and art programs and many other services are reduced or eliminated. These cuts need to be restored.

The children in these counties deserve the same quality schools and educational opportunities as the rest of America.

In this election year, we have heard a lot about education and how it is a priority for everybody. Well, this

is a chance for people in this House to show their commitment to education by voting yes on H.R. 2389.

I hope they will join me in voting yes on education and voting yes on H.R. 2389.

Mr. STENHOLM. Mr. Speaker, I have no further requests for time and encourage support of H.R. 2389.

Mr. Speaker, I yield back the balance of my time.

Mr. GOODLATTE. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I neglected to mention and thank the gentlewoman from North Carolina (Mrs. CLAYTON) for her contribution. We thank her very much. I, too, urge my colleagues to support this legislation.

Mr. COMBEST. Mr. Speaker, I rise today in support of H.R. 2389, the Secure Rural Schools and Community Self-determination Act of 1999. As I do so, I urge my colleagues to join me as a statement of our united commitment to education and economic stability in rural forest communities all over America.

Our rural forest communities are at a cross-roads. Nearly a hundred year ago, the federal government made a commitment to share the revenues derived from federal lands to fund local schools and roads. The purpose of this commitment was to compensate these communities for the loss of local property taxes. Yet, during the last several years, the federal government has unilaterally defaulted on this commitment. The federal timber sale program has collapsed and federal policies now virtually prohibit the use of our national forests to sustain the communities and schools that are located in and around them. As a result

rural forest communities and school districts all over America are in tatters – the victims of their own government.

The purpose of H.R. 2389 is to right this wrong. By providing stable and predictable funding for rural education, it will ensure that school children, in forest-dependent communities are no longer punished by the policies of their own government. Passage of this bill will directly benefit 4 million schoolchildren in 700 counties nationwide, thereby opening the same doors of opportunity for them that children in other parts of the country enjoy.

H.R. 2389 also provides a framework for rural forest counties to rebuild their communities and their way of life by giving them a direct stake in the management of our federal forests. By giving local stakeholders both the opportunity and the funding resources to address local forest management issues, local experts can work together on solutions that are not only good for the forest, but also the local economics that sustain them.

H.R. 2389 is supported by a broad range of interests from all over the country. The bill has earned the endorsement of the National Association of Counties, the National Education Association, the U.S. Chamber of Commerce, the American Federation of State, County and Municipal Employees, and a grass roots coalition of over 1,000 local education, business and government organizations in 36 states.

I urge my colleagues to take a stand in support of our rural school children and the forest communities in which they live, Join me in voting aye on H.R. 2389.

Mr. GOODLATTE. Mr. Speaker, I yield back the balance of my time.

The SPEAKER pro tempore (Mr. RYAN of Wisconsin). The question is on the motion offered by the gentleman from Virginia (Mr. GOODLATTE) that the House suspend the rules and concur in the Senate amendment to the bill, H.R. 2389.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the Senate amendment was concurred in.

A motion to reconsider was laid on the table.

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USDA ANNOUNCES $384 MILLION IN FUNDING FOR RURAL AMERICAN SCHOOLS, COMMUNITY PROJECTS

WASHINGTON, Dec. 13, 2001 – Agriculture Secretary Ann M. Veneman today announced the release of more than $384 million to 41 states and Puerto Rico to help rural communities improve public schools, invest in road improvement projects, and strengthen forest stewardship programs.

"Investing in schools and education, particularly in our rural communities, is a high priority for this Administration," said Veneman. "These funds will allow local communities valuable resources so they can determine their needs and make the proper investments to help our children and strengthen rural areas."

Veneman, who was joined by Sen. Larry Craig, Idaho; Sen. Ron Wyden, Ore.; and Sen. Gordon Smith, Ore., at a press conference announcing the funds, said many states

will benefit from this program, which was authorized as part of the Secure Rural Schools and Community Self-Determination Act. Oregon will receive $154 million; California, $65 million; Idaho, nearly $23 million; and Washington, approximately $44 million.

Veneman announced that over the next six years, USDA, through the Forest Service, will provide another $1.1 billion for schools and rural communities in addition to the $384 million released today. These payments are the first issued under the new legislation, which returns dollars to states with national forests.

"This historic legislation helps provide important solutions to some of the challenges facing rural communities," she said. "States and local counties will make the decision on how the dollars will be spent. For example, they can buy new books, repair or expand schools or hire more teachers to help improve the education opportunities for our nation's children."

Based on legislation passed in 1908, 25 percent of Forest Service revenues from timber sales, grazing, recreation, some mineral use fees and other land use receipts go to states that host national forests. However, the Secure Rural Schools and Community Self-Determination Act of 2000 gave counties the option of staying with the traditional payment plan or choosing a predictable payment based on the average of the state's three highest payments between fiscal years 1986 and 1999.

Nationwide, counties have seen a significant drop in payments over the last decade under the traditional plan due to the significant decline in timber harvesting on national forests. The 2000 legislation stabilizes payment

levels near to their historic high for six years. About 75 percent of the 700-plus counties elected to use the new formula, thus receiving increased funding.

In addition, the new legislation authorizes local resource advisory committees to give communities choice in funding forestry stewardship projects. To date 49 resource advisory committees have been established.

Counties that receive $100,000 or more under the new legislation are required to allocate 15 to 20 percent of their funding for investments in county projects or for forest projects that implement stewardship objectives to enhance forest ecosystems or both.

The fiscal 2001 payments are listed in the attached table and available on USDA's website at www.usda.gov. However, the payments do not reflect national grassland revenues, which are calculated on a calendar year basis and will be provided to counties in March.

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NOTE TO REPORTERS: Audio sound bites are available from today's press conference by calling 202-488-8358 or by visiting USDA's website at *http://www.usda.gov/*

USDA Forest Service Payment to States – Fiscal Year 2001

	INTERIM TRADITIONAL 25% FUND ACT PAYMENT (1)	NEW PUBLIC LAW 106-393 TITLE I & III (2)	NEW PUBLIC LAW 106-393 TITLE II (3)	TOTAL ALL COLUMNS
ALABAMA	0.00	2,032,381.86	0.00	2,032,381.86
ALASKA	0.00	8,795,864.26	367,733.67	9,163,597.93
ARIZONA	1,208.54	7,000,250.26	319,079.78	7,320,538.58
ARKANSAS	827,298.88	5,133,732.00	234,458.85	6,195,489.73
CALIFORNIA	543,076.99	61,164,251.32	4,042,659.21	65,749,987.52
COLORADO	1,806,749.70	3,040,417.90	0.00	4,847,167.60
FLORIDA	1,166.81	2,379,739.51	0.00	2,380,906.32
GEORGIA	27.00	1,220,968.87	0.00	1,220,995.87
IDAHO	0.00	20,201,987.32	2,631,538.51	22,833,525.83
ILLINOIS	0.00	285,058.20	0.00	285,058.20
INDIANA	0.00	121,965.20	0.00	121,965.20
KENTUCKY	18,109.10	383,927.00	0.00	402,036.10
LOUISIANA	0.00	3,643,760.96	0.00	3,643,760.96
MAINE	0.00	38,797.87	0.00	38,797.87
MICHIGAN	1,800,044.05	579,638.58	0.00	2,379,682.63
MINNESOTA	2,268,671.12	855,579.80	0.00	3,124,250.92
MISSISSIPPI	155,610.32	7,411,526.76	62,893.62	7,630,030.70
MISSOURI	39,988.53	2,333,749.36	0.00	2,373,737.89
MONTANA	49,395.20	13,364,143.90	54,154.97	13,467,694.07
NEBRASKA	7,801.17	28,364.00	0.00	36,165.17
NEVADA	63,756.23	329,326.26	0.00	393,082.49
NEW HAMPSHIRE	330,493.07	0.00	0.00	330,493.07
NEW MEXICO	79,264.97	1,780,995.70	103,690.67	1,963,951.34
NEW YORK	2,359.34	4,457.20	0.00	6,816.54
NORTH CAROLINA	0.00	956,170.69	0.00	956,170.69
NORTH DAKOTA	58.37	0.00	0.00	58.37
OHIO	1,324.82	38,502.20	0.00	39,827.02
OKLAHOMA	0.00	1,302,515.40	0.00	1,302,515.40
OREGON	0.00	141,075,407.15	13,696,607.49	154,772,014.64
PENNSYLVANIA	2,423,337.13	1,409,893.40	0.00	3,833,230.53
SOUTH CAROLINA	0.00	3,079,722.56	0.00	3,079,722.56
SOUTH DAKOTA	0.00	3,669,187.27	0.00	3,669,187.27
TENNESSEE	0.00	524,734.00	0.00	524,734.00
TEXAS	0.00	4,446,516.84	183,196.99	4,629,713.83
UTAH	289,056.85	1,397,838.54	0.00	1,686,895.39
VERMONT	81,282.33	224,533.60	0.00	305,815.93
VIRGINIA	126,710.11	618,639.08	0.00	745,349.19
WASHINGTON	0.11	41,202,609.33	3,168,715.07	44,371,324.51
WEST VIRGINIA	34,281.51	1,826,945.47	0.00	1,861,226.98
WISCONSIN	2,179,757.55	50,346.10	0.00	2,230,103.65
WYOMING	46,614.68	2,103,117.49	66,627.03	2,216,359.20
PUERTO RICO	8,872.42	0.00	0.00	8,872.42
TOTAL	$13,186,316.87	$346,057,563.21	$24,931,355.86	384,175,235.94

1. This column reflects the interim payment (75% of total payment); a second final payment will be made near end of the calendar year for counties that elected the traditional 25% payment.

2. This column reflects Title I and Title III dollars only. Title I dollars are used for schools and roads, while Title III dollars are used for county projects.

3. Title II dollars are used for federal stewardship projects and are shown for comparison purposes only. These funds will be held in a special U.S. Treasury account until federal stewardship projects are approved and implemented.

RESPONSE REQUESTED

Supreme Court, U.S.
FILED
JAN 10 2003
CLERK

NO. 02-531 (2)

IN THE SUPREME COURT OF THE UNITED STATES

OKANOGAN SCHOOL DISTRICT NO. 105, ET AL.,

Petitioners,

v.

DR. TERRY BERGESON, IN HER OFFICIAL CAPACITY AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF WASHINGTON; AND MICHAEL J. MURPHY, IN HIS OFFICIAL CAPACITY AS THE TREASURER OF THE STATE OF WASHINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

CHRISTINE O. GREGOIRE
Attorney General

William Berggren Collins
Sr. Assistant Attorney General
Counsel of Record

David A. Stolier
Assistant Attorney General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245

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BRIEF IN OPPOSITION

The Attorney General of Washington on behalf of the Washington State Superintendent of Public Instruction and the Washington State Treasurer respectfully requests that this Court deny the petition for a writ of certiorari in this case.

STATEMENT

Washington receives federal forest funds under 16 U.S.C. § 500. This case concerns the state's use of this money to fund the state's public schools in counties where national forests are located.

The Washington Constitution provides that it is "the paramount duty of the state to make ample provision for the education of all children" in the state, and it directs the Legislature to "provide for a general and uniform system of public schools". Wash. Const. art. IX, §§ 1, 2.

To meet its constitutional obligation, the Legislature adopted the Basic Education Act, Wash. Rev. Code §§ 28A.150.200 *et seq.* The largest part of basic education funding is called the basic education allocation. Wash. Rev. Code §§ 28A.150.250-.260. It is based on the annual average full-time equivalent (FTE) student enrollment in each school district. For example, each district is entitled to 49 certificated instructional staff for every 1,000 FTE students enrolled in grades kindergarten through third grade. Wash. Rev. Code § 28A.150.260(2)(b)(i). Based on a complex series of formulas, the state calculates the basic education allocation for each school district.

In addition to the basic education allocation, school districts receive other basic education funding for things such as special education, Wash. Rev. Code § 28A.155.010, student transportation, Wash. Rev. Code § 28A.160.150, and bilingual education, Wash. Rev. Code § 28A.180.080. The state also provides educational enhancements that go beyond basic education. This includes things such as special funding for highly capable students, Wash. Rev. Code § 28A.185.020, learning assistance programs, Wash. Rev. Code § 28A.165.040, and traffic safety education, Wash. Rev. Code § 28A.220.040.

School districts are authorized to levy property taxes. Wash. Rev. Code § 84.52.053. However, under the Washington Constitution, school district levies may not be used to "discharge the State's paramount duty of making ample provision for basic education" and may only be used, instead, "to fund an enrichment program which goes beyond that required by the constitution[.]" *Seattle Sch. Dist. 1 v. Washington*, 585 P.2d 71, 99 (Wash. 1978) (internal punctuation omitted). School districts that levy property taxes may qualify for additional state funds for local levy assistance. Wash. Rev. Code §§ 28A.500.010 *et seq.* The purpose of this levy assistance is to offset the effect that above average property tax rates may have on the district's ability to raise local revenue to pay for enrichment programs.

The state also receives federal funds. This case concerns funds paid to the state pursuant 16 U.S.C. § 500.[1] Under 16 U.S.C. § 500, certain revenues derived from national forests are paid by the federal government directly to the states in which the forests are located. 16 U.S.C. § 500 provides that "*twenty-five per centum* of all moneys received during any fiscal year from each national forest *shall be paid*, at the end of such year, by the Secretary of the Treasury *to the State* or Territory in which such national forest is situated[.]" Pet. at 2 (emphasis added). The statute directs that these funds are "*to be expended as the State* or Territorial *legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated*[.]" Pet. at 2 (emphasis added).

Federal forest funds received by the state are deposited in the federal forest revolving fund and state law provides that the funds "shall be expended in accordance with the requirements of Title 16, section 500, United States Code[.]" Wash. Rev. Code § 28A.520.020(4). All of the funds are distributed to

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[1] The state and school districts receive other federal funds from a variety of other federal programs—Elementary And Secondary Education Act, 20 U.S.C. § 6301 *et seq.*; the Individuals With Disabilities Education Act, 20 U.S.C. § 1401 *et seq.*; Carl Perkins Act, 20 U.S.C. § 2301 *et seq.*; and the National School Lunch And Breakfast Programs, 42 U.S.C. § 1751 *et seq.* These federal funds are not at issue in this case.

counties that contain the forest land from which the revenue was generated in the following manner:

The State Treasurer, who is custodian of the account, allocates fifty percent directly to the counties to be spent at the counties' discretion for the benefit of public schools, public roads, or other public purposes authorized by federal law. Wash. Rev. Code § 28A.520.020(1). Pet. at 2. The remaining fifty percent is distributed directly to the school districts in the counties in proportion to the number of full-time equivalent students in the district, as of the October enrollment count. Wash. Rev. Code § 28A.520.020(2). Pet. at 2.

The law provides that federal forest funds distributed to a school district are to be credited toward a district's basic education allocation. Wash. Rev. Code § 28A.520.020(3). Pet. at 2. For example, petitioner Okanogan School District received a total of $91,378 in federal forest revenues in fiscal year 1998-99. Thus, $91,378 was credited toward the District's basic education allocation. Thereafter, the state gave the District an additional $3,743,136 to reach the basic educational allocation. In the same fiscal year, the state allocated to the Okanogan School District $1,889,229 for other basic education programs and state enhancement programs. In addition, the state paid the District $379,505 for local levy assistance. Thus, during the 1998-99 fiscal year the

state paid the Okanogan School District $6,103,248.[2] The $91,378 in forest revenues received by the District is therefore equal to approximately 1.5 percent of the state monies received by the District.

Petitioners object to the fact that the federal forest funds they receive are credited against their basic education allocation. In February 2000, Okanogan School District, along with seventeen other school districts, Okanogan County, and two private citizens filed a complaint in United States District Court for the Western District of Washington. The named defendants were the Washington State Superintendent of Public Instruction and the Washington State Treasurer. The plaintiffs requested a declaratory judgment that Wash. Rev. Code § 28A.520.020(3) violates the Supremacy Clause of the United States Constitution and also sought compensatory damages. The defendants filed FRCVP 12 motions to dismiss the county and school district plaintiffs and to dismiss all damage claims. The court granted both motions. Pet. at 23a. Because the court's order appeared overly broad, both parties sought and were granted clarification that only the citizen plaintiffs claims for prospective relief remained in the case. Pet. at 24a. The defendants thereafter filed a motion for summary judgment on the merits and to dismiss the

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[2] During the fiscal year ending August 31, 1999, Okanogan School District also received a total of $785,135 in federal revenues from a variety of federal programs. *See* note 1 *supra* p. 3.

remaining citizen plaintiffs for lack of standing. The plaintiffs filed a cross-motion for summary judgment on the merits. The court granted summary judgment in favor of the defendant state officials on both issues. Pet. at 33a.

Eight of the original school district plaintiffs and the citizens appealed the order dismissing the political subdivisions and the summary judgment order. The Ninth Circuit affirmed the dismissal of the political subdivisions based on its decision in *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980), which held that political subdivisions do not have standing to challenge the constitutionality of a state statute. The court below declined to recognize an exception to the rule in *City of South Lake Tahoe* in this case, stating there was "no reason to except Okanogan on account of anything in particular that [16 U.S.C.] § 500 has to say about school districts". Pet. at 9a.

The court also reviewed the standing of the citizens, raising "serious questions" about both constitutional standing and prudential principles. Pet. at 14a. Specifically, the court was concerned that the citizens could not meet the causation and redressability prongs of the Article III analysis; that the dispute with the state was outside the zone of interests protected by 16 U.S.C. § 500; and the claim raised a generalized grievance regarding how the state should distribute its education dollars. Pet. at

14a. Without ruling on the citizens' standing, the court proceeded to the merits.

On the subject of the merits, the court concluded that the plain language of the statute directs that forest funds be paid to the state and permits the state Legislature great discretion in prescribing how best to use the moneys for the benefit of public roads or schools. The court also distinguished the Federal Impact Aid Act and the line of cases construing it; noting the differences between the text of the Impact Aid statute and 16 U.S.C. § 500. Finally, the court recognized that the Secure Rural Schools And Community Self-Determination Act of 2000, Pub. L. 106-393, 114 Stat. 1607, added no conditions to the receipt of federal forest funds. Rather, it left the text of 16 U.S.C. § 500 intact. "Section 500 does not constrain how the state allocates its own money, or how school districts spend theirs." Pet. at 17a.

Petitioners filed a petition for rehearing with suggestion for rehearing en banc which was denied July 15, 2002.

REASONS FOR DENYING THE PETITION

The petition presents three questions. The main question (number 3) is whether Wash. Rev. Code § 28A.520.020(3), which authorizes the federal forest funds received by a school district to be credited against the district's basic education allocation, violates the Supremacy Clause. This does not present a substantial federal question. The

decision below is consistent with *King County v. Seattle School District 1*, 263 U.S. 361 (1923), *Carroll v. Bruno*, 499 P.2d 876 (Wash. 1972), and *Oklahoma v. State Board of Education*, 293 P.2d 583 (Okla. 1956). Each of these cases dealt with 16 U.S.C. § 500 and rejected the notion that school districts have a right to federal forest funds. *Carroll* and *Oklahoma* reject the precise claim made by the petitioners in this case. Petitioners do not cite—and we unaware of—any contrary decision interpreting 16 U.S.C. § 500. There is no conflict for the Court to resolve. Petitioners simply disagree with the courts' consistent interpretation of the statute.

Petitioners claim that their other two questions present conflicts that should be resolved by the Court. Question number 2 asks whether 16 U.S.C. § 500 confers standing on students to challenge Wash. Rev. Code § 28A.520.020(3). The court below did not reach this issue and petitioners' claim that the refusal to confer standing creates a conflict is simply not credible. Petitioners are simply trying to manufacture a conflict where none exists.

Finally, question number 1 asks whether a school district, as a political subdivision of the state, has standing under 16 U.S.C. § 500 to challenge Wash. Rev. Code § 28A.520.020(3). The court below ruled that the school district did not have standing. Other circuits—in cases that did not involve 16 U.S.C. § 500—have ruled that political subdivisions do have standing to challenge a state law

based on other federal statutes and the Supremacy Clause. Thus, there is some conflict between the decision below and these cases. However, the conflict is neither as great as petitioners claim nor ripe for review. Also, this case presents a particularly poor vehicle to resolve the conflict in light of the fact the judgment below on the main question does not present a substantial federal question.

1. The Decision Below Interpreting 16 U.S.C. § 500 Is Consistent With Every Other Decision Interpreting that Statute

The Ninth Circuit's decision that 16 U.S.C. § 500 does not prohibit the state from crediting federal forest funds against the basic education allocation is consistent with every other decision interpreting that statute. Beginning with this Court's decision in *King County*, courts have consistently rejected the notion that school districts have a right to federal forest funds. At the time of *King County*, state law provided that the county was responsible for distributing all federal forest funds. One year the county distributed less than half of the funds to the school district, and the district sued to obtain an even split. This Court rejected the school district's claim because it concluded that "[w]hen turned over to the state, the money *belongs to it absolutely*. There is no limitation upon the power of the Legislature to prescribe how expenditures shall be made for the purposes stated[.]" *King County*,

263 U.S. at 364 (emphasis added). The Court emphasized that the federal forest funds "granted by the United States *are assets in the hands of the state* to be used for the specified purposes as it deems best" and that "[n]o trust for the benefit of the [school district] is created by the grant." *Id.* at 364-65 (emphasis added); 364.

Carroll involved exactly the same claim raised by petitioners. In *Carroll*, the plaintiffs challenged a prior version of Wash Rev. Code § 28A.520.020(3) and claimed that including "federal forest funds in the general statewide equalization formula spreads the benefits to the entire state and thus deprives the districts designated by federal law from the very benefits intended to be granted them." *Carroll*, 499 P.2d at 877. The Washington Supreme Court rejected this claim. *Id.* at 879 ("We are of the opinion, therefore, that 16 U.S.C. § 500 (1960) which makes available national forest funds to school districts of the state having national forests within their areas, does not preclude the Superintendent of Public Instruction from including them in state equalization funds.").

The Oklahoma Supreme Court also considered and rejected exactly the same claim in *Oklahoma*, 293 P.2d at 584.

The decision below is consistent with these decisions. Petitioners do not cite—nor are we aware of—any contrary decisions interpreting 16 U.S.C. § 500. Moreover, the decision below is correct. The

plain language of 16 U.S.C. § 500 expressly provides that federal forest funds shall be "*expended as the State or Territorial legislature may prescribe* for the benefit of the public schools and public roads of the county or counties in which such national forest is situated[.]" (Emphasis added.) Here, Washington expends the funds to support the school district's basic education allocation in counties that contain national forests. This falls within the terms of 16 U.S.C. § 500. *King County*, 263 U.S. at 364 ("public schools . . . are provided and maintained by the state or its subdivisions, and the moneys granted by the United States are assets in the hands of the state to be used for the specified purposes as it deems best").

Petitioners argue that the Secure Rural Schools And Community Self-Determination Act of 2000 (SRSCS Act), Pub. L. 106-393, 114 Stat. 1607, requires a different result. Pet. at 27-29. However, the Ninth Circuit correctly concluded that this act did not alter the distribution command of 16 U.S.C. § 500. The SRSCS Act was intended to preserve levels of payments—not alter states' use of the payments.

Under section 102(b), counties can elect to receive either the twenty-five percent revenues traditionally calculated under 16 U.S.C. § 500 or an amount equal to a calculated average of the three highest payments during the years of 1986-99. What is significant is that the text of 16 U.S.C. § 500 is preserved, still paying the federal forest funds to the

state to be expended, as the state Legislature may prescribe.

Congress is presumed to be aware of judicial interpretation of a statute. *Merrill Lynch Pierce Fenner & Smith v. Curran*, 456 U.S. 353, 382 n.66 (1982). There has been a consistent judicial interpretation of 16 U.S.C. § 500 going back to *King County* in 1923, and Congress failed to clearly express any intent to alter the conditions under which the states receive the federal grant. Further, nothing in the Congressional Record excerpt submitted by petitioners reveals an intent to amend the way Washington allocates its forest funds or state education moneys.

Since the courts are in agreement about the meaning of 16 U.S.C. § 500, petitioners make several other arguments in an attempt to make the question seem important. They claim that school districts are losing a substantial amount of funds—$100,000 a year in the case of the Okanogan School District. Pet. at 25. But this amounts to only 1.5 percent of the $6 million the state provides to the Okanogan School District to operate the public schools. Petitioners also argue that this will be the Court's only chance to consider the issue because only Washington and Oregon offset federal forest funds against state educational funding. Pet. at 30. However, the fact that petitioners' complaint is limited to just two states counsels against granting the petition. It is difficult to say that a decision that

affects only two states has national significance to require review by this Court.

2. Petitioners' Second Question Does Not Involve A Conflict

Petitioners' second question asks whether 16 U.S.C. § 500 confers standing on students to challenge Wash. Rev. Code § 28A.520.020(3). The Ninth Circuit did not reach this issue and petitioners claim that this failure runs afoul of *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). Pet. at 18-20. Yet *Steel Co.* laid down no bright line rule that it was impermissible for a court to consider the merits of a case and, thus, avoid the standing issue. *Steel Co.*, 523 U.S. at 110-11 ("I write separately to note that, in my view, the Court's opinion should not be read as cataloging an exhaustive list of circumstances under which federal courts may exercise judgment in reserving difficult questions of jurisdiction when the case alternatively could be resolved on the merits in favor of the same party." J., O'Connor, concurring (internal punctuation omitted) (citation omitted)); *id.* at 111 ("This Court has previously made clear that courts may reserve difficult questions of jurisdiction when the case alternatively could be resolved on the merits in favor of the same party." J., Breyer, concurring in part and concurring in the judgment (internal punctuation omitted) (citation omitted)). In this case the court below was faced with a difficult standing question. It was permissible

for the court to avoid that difficult question and resolve the case on the merits in favor of the same party—in this case respondents.

Petitioners argue that the Ninth Circuit's failure to grant the individual student plaintiffs standing "creates a conflict with every court to consider similar allegations[.]" Pet. at 20. This argument misunderstands the concept of conflict as used in Rule 10. The fact that the Ninth Circuit did not rule on the standing issue does not conflict with any case where the court found standing.

Moreover, the primary case relied on by petitioners (Pet. at 20-21), *Gwinn Area Community Schools v. Michigan*, 741 F.2d 840 (6th Cir. 1984), did not involve 16 U.S.C. § 500.[3] Instead, *Gwinn* dealt with the Impact Aid Act under which the United States makes payments directly to school districts. *Gwinn*, 741 F.2d at 842. Even if the Ninth Circuit ruled that the students did not have standing under 16 U.S.C. § 500 there would be no conflict with

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[3] Petitioners also claim the decision below conflicts with a district court decision, *Shepheard v. Godwin*, 280 F. Supp. 869 (E.D. Va. 1968). Pet. at 21. This case is even further removed. The court never discussed standing, and it is not clear that the plaintiffs were students. The court described the plaintiffs as "[r]esidents, real estate owners and taxpayers" of the county whose grievance was having "to make up the unindemnified portion of the impact costs". *Shepheard*, 280 F. Supp. at 871, 873. Similarly, decisions of this Court cited by petitioners (Pet. at 21) involve different statutes and do not even discuss the issue of standing. *Papasan v. Allain*, 478 U.S. 265 (1968); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

Gwinn. The fact that one court concludes there is standing under one statute does not create a conflict with a court that concludes there is no standing under another statute. However, since the Ninth Circuit did not reach this issue it is simply an academic question—not a substantial federal question that requires resolution by this Court.

3. Petitioners' First Question Is Not Ripe For Review

The court below held that petitioner school districts, as political subdivisions of the state, did not have standing under 16 U.S.C. § 500 to challenge Wash. Rev. Code § 28A.520.020(3) under the Supremacy Clause. Pet. at 8a-10a. This decision is consistent with other Ninth Circuit decisions rejecting challenges to state statutes by political subdivisions under the Supremacy Clause. *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360 (9th Cir.), *cert denied*, 525 U.S. 873 (1998); *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104 (9th Cir. 1999), *cert denied sub nom Palomar Pomerado Health Sys. v. Bonta*, 528 U.S. 1074 (2000).

Here too, petitioners argue that the decision below conflicts with other court of appeals decisions that have recognized that a political subdivision may challenge the constitutionality of a state law under the Supremacy Clause. Petitioners primarily point to *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.), *cert denied*, 444 U.S. 827 (1979), *United States*

v. Alabama, 791 F.2d 1450 (11th Cir. 1986), *cert denied sub nom Board of Trustees of Alabama State University v. Alabama State Board of Education*, 479 U.S. 1085 (1987), and *Branson School District RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), *cert denied sub nom Branson School District RE-82 v. Owens*, 526 U.S. 1068 (1999). Pet. at 11-14.

Unlike petitioners' second question, there is some conflict between the decision below and the cases cited by petitioners. However, petitioners exaggerate the extent of the conflict. The court below did not simple apply a per se rule. It also looked at the substance of 16 U.S.C. § 500 to see if the school districts had standing. *Okanogan School Dist. 105*, Pet. at 9a ("We have declined to recognize an exception for Supremacy Clause claims . . . and there is no reason to except Okanogan on account of anything in particular that § 500 has to say about school districts. To the contrary, to the extent that § 500 names beneficiaries at all, it names *states* and *counties*. It does not mention *school districts*.").

Even courts that recognize that political subdivisions may have standing in principle do not grant standing if they conclude that Congress did not intend political subdivisions to be able to challenge a state law. For example, in *United States v. Alabama*, 791 F.2d 1450, cited by petitioners (Pet. at 11), the court recognized that the Eleventh Circuit had not adopted a per se rule. *Id.* at 1455. Despite this fact, the court ruled that the state university lacked

standing to bring an action against the state under Title VI. *Id.* at 1456-57 ("Absent any indication of Congressional intent to grant additional rights under this statute to non-private state subdivisions against the state itself, we decline to infer such a right of action by judicial fiat.").

Similarly, courts that recognize political subdivision standing in principle would likely concluded that school districts have no standing under 16 U.S.C. § 500. Section 500 does not mention school districts, and this Court held in *King County*, 263 U.S. at 364, that the grant of federal forest funds did not create a trust for the benefit of school districts and that the funds were, in fact, assets of the state. Thus, while there is a conflict about whether there should be a per se rule, there is likely no conflict about school district standing under 16 U.S.C. § 500.

Moreover, this conflict is not ripe for review because the various courts of appeal have not considered the impact of this Court's recent federalism decisions. The crux of petitioners' first question is whether Congress, acting under the Supremacy Clause, can authorize a political subdivision of the state to challenge the constitutionality of a state law in federal court. This question involves a fundamental issue of federalism—the power of Congress to authorize a creature of the state to challenge the laws of its creator.

In recent decisions, this Court has limited the power of Congress to intrude on state sovereignty. The Court has strictly defined the power of Congress to waive the states' Eleventh Amendment immunity to suite in federal court. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (the Commerce Clause does not authorize Congress to waive state Eleventh Amendment immunity); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (Congress acted beyond the scope of the authority granted in section 5 of the Fourteenth Amendment in waiving state Eleventh Amendment immunity); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (same); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (same). In the same vein, the Court ruled that Congress lacks the authority to waive state sovereign immunity to suite in state court. *Alden v. Maine*, 527 U.S. 706 (1999). The Court has also limited the power of Congress to require a state to enact or enforce a federal regulatory program or conscript the state's officers directly. *New York v. United States*, 505 U.S. 144 (1992) (Congress could not require states to accept ownership of low level radioactive waste or regulate according to instructions of Congress); *Printz v. United States*, 521 U.S. 898 (1997) (Congress could not require local sheriffs to conduct background checks on prospective handgun purchasers).

Petitioners' first question implicates all of the concerns behind the Court's recent federalism

decisions. It involves both bringing the state into federal court and direct action by Congress on the states' political subdivisions. Yet the cases relied on by petitioners to establish the conflict were decided before most of the Court's federalism decisions. Thus, it would be prudent to let this issue percolate in the courts of appeal to allow them to consider the impact of these recent decisions on the question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHRISTINE O. GREGOIRE
Attorney General

William Berggren Collins
Sr. Assistant Attorney General
Counsel of Record

David A. Stolier
Assistant Attorney General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245

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(3)

Supreme Court, U.S.
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No. 02-531

IN THE
Supreme Court of the United States

OKANOGAN SCHOOL DISTRICT NO. 105, et al.,
Petitioners,

v.

DR. TERRY BERGESON, in her official capacity as Superintendent of Public Instruction of the State of Washington; and MICHAEL J. MURPHY, in his official capacity as the Treasurer of the State of Washington,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

STEPHEN M. RUMMAGE
Counsel of Record
JEFFREY L. FISHER
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150

Attorneys for Petitioners

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REPLY BRIEF FOR PETITIONERS

None of the arguments that Respondents (hereafter "the State") offer in opposition to certiorari gives reason to deny review of the important constitutional issues presented here.

I. Review is Warranted to Resolve the Circuit Conflict Over Whether Political Subdivisions Have Standing to Bring Pre-emption Claims Against State Officials.

Neither of the State's arguments for delaying resolution of the circuit split regarding political subdivision standing has merit.

First, contrary to the State's suggestion (Opp. at 15), the Ninth Circuit does have a "per se rule" prohibiting political subdivisions from bringing pre-emption claims, and it applied that rule here. Prior to this case, the Ninth Circuit twice characterized its decision in *City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency,* 625 F.2d 231 (9th Cir. 1980), as establishing a "broad, per se rule" that "foreclose[s] the possibility" of allowing any political subdivision to bring a pre-emption claim. *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank,* 136 F.3d 1360, 1362, 1364 (9th Cir. 1998); *accord Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1107 (9th Cir. 1999); *id.* at 1108-10 (Hawkins, J., concurring) (circuit has "per se rule"). The panel here thus held that "*South Lake Tahoe* controls" simply because "[s]chool districts are a political subdivision of the state, and political subdivisions of a state may not challenge the validity of a state statute in federal court." App 3a, 9a.

Nor is there any doubt that School Districts would have standing in all other courts to consider this issue. Those courts have held that political subdivisions may bring pre-emption claims if (i) they have sufficient autonomy under

state law and (ii) they satisfy traditional Article III criteria. *See, e.g., Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628-30 (10th Cir. 1998); *Allegheny County Sanitary Auth. v. EPA*, 732 F.2d 1167, 1173 n.3 (3rd Cir. 1984)[1]; *Rogers v. Brockette*, 588 F.2d 1057, 1065-66 (5th Cir. 1979); *United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986) (adopting *Rogers*); *City of Bristol v. Earley*, 145 F. Supp. 2d 741, 744-45 (W.D. Va. 2001). Neither the State nor the courts below has ever disputed that the School Districts are substantially independent entities under Washington law. *See* Pet. at 17-18. Nor have they ever suggested that the Districts fail to satisfy any of the traditional Article III standing criteria. Each of the Districts claims the State is depriving it of tens of thousands of dollars each year by obstructing the federal directives that forest aid be used to *benefit* impacted schools by *supplementing* other available state educational funds. *See* Pet. at 25-29. The Districts' injury is caused by the operation of Wash. Rev. Code §28A.520.020(3), which subtracts the exact amount of federal forest aid that they receive from their otherwise available basic education allowance. If this Court finds §28A.520.020(3) pre-empted, the State will have to start giving the Districts' their full basic education allowance, without offsetting it against their federal forest aid. Under any conventional application of Article III principles, the Districts have standing. Their case stands or falls with the correctness of the Ninth Circuit's per se bar against political subdivisions brining pre-emption cases in federal court.

Second, contrary to the State's suggestion (Opp. at 17-18), there is no reason to delay resolving this circuit split for federalism reasons. Other than kicking up dust on the subject, in fact, the State never makes any argument as to how this Court's recent Tenth and Eleventh Amendment decisions

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[1] Petitioners overlooked this Third Circuit decision in researching the Petition for a Writ of Certiorari. We regret our oversight.

might apply here – much less as to why those decisions pertain to Article III standing. In any event, finding standing here poses no Tenth Amendment problem because allowing political subdivisions to bring pre-emption claims in federal court does not force any state official to do anything. Bringing such cases is purely voluntary, and local officers may "take an active role in the implementation of federal law" if they do so "without a congressional directive that they implement it." *Printz v. United States,* 521 U.S. 898, 913 (1997); *see also* Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control,* 97 Mich. L. Rev. 1201, 1210-15, 1248 (1999) (discussing this standing issue and finding no commandeering). Nor does finding standing here implicate the Eleventh Amendment, for this is a suit for prospective relief against state officials. *See Ex Parte Young,* 209 U.S. 123 (1908).

Further, even if lawsuits brought by political subdivisions theoretically could raise federalism concerns, no such concerns are present here or in the other cases that have generated the conflict on this issue, for federal aid programs are enacted pursuant to Congress's core Spending Clause authority. "[A] perceived Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants." *South Dakota v. Dole,* 483 U.S. 203, 210 (1987); *see also New York v. United States,* 505 U.S. 144, 173 (1992); *Oklahoma v. United States Civil Serv. Comm'n,* 330 U.S. 127, 143 (1947) (Congress has "power to fix the terms upon which its money allotments to [a] state shall be disbursed"). If states do not like the terms of a federal program, they can simply "decline [the] federal grant." *New York,* 505 U.S. at 168.

The absence of federalism impediments to lawsuits such as this is so patent that neither of the two courts to find

political subdivision standing since this Court's decisions in *Printz*, *New York*, and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), have found it necessary even to reference the subject. *See Branson Sch. Dist*, 161 F.3d at 628-30; *Earley*, 145 F. Supp. 2d at 744-45. Nor did the Ninth Circuit here mention the issue, despite Petitioners' briefing to it on the point.

Finally, even if a serious argument could be made that the issue of political subdivision standing actually carries federalism implications, the issue is too pressing for this Court to leave this circuit split unresolved. Not only is this standing question crucial in federal education funding cases such as this one, *Rogers*, 588 F.2d at 1066-65, and *Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk*, 91 F.3d 1240 (9th Cir. 1996), *vacated and appeal dismissed*, 139 F.3d 634 (9th Cir. 1997), but the issue also arises in pre-emption cases involving the Medicaid Act, *Belshe*, 180 F.3d at 1107; the Telecommunications Act of 1996, *Earley*, 145 F. Supp. 2d at 744-45; federal aviation safety rules, *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d at 1362; environmental land use regulations, *South Lake Tahoe*, 625 F.2d at 233; federal regulation of water rights, *Rural Water Dist. No. 1 v. City of Wilson*, 243 F.3d 1263, 1274 (10th Cir. 2001); the Water Pollution Control Act, *City of S. Portland v. State*, 476 A.2d 690, 698-99 (Me. 1984); and federally donated lands held in trust, *Lassen v. Arizona*, 385 U.S. 458, 459 & n.1 (1967); *Branson Sch. Dist.*, 161 F.3d at 628-29. In light of the recurring importance of this issue, this Court should not delay its resolution any longer.

II. The Ninth Circuit's Treatment of the Students' Standing Warrants This Court's Review.

The students' standing is critical because if this Court holds that political subdivisions lack standing to bring pre-emption claims, then these individuals will be the only

potential plaintiffs who could enforce the disbursement conditions on federal grants such as this one. Equally important, the Ninth Circuit's treatment of this issue and the State's position on it contravene basic Article III principles.

A. The Ninth Circuit's Decision Conflicts with *Steel Co.*

The State's assertion that "[i]t was permissible for the [Ninth Circuit] to avoid th[e] difficult question" of whether the students have standing and "resolve the case on the merits in favor of the same party," Opp. at 13-14, fundamentally misapprehends this Court's decision in *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83 (1998). This Court held there in no uncertain terms that "[t]he requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception." *Id.* at 94-95 (internal quotation and citation omitted). Indeed, the Ninth Circuit's decision here is all the more troubling because the *Steel Co.* opinion explicitly directed the Ninth Circuit to abandon its practice of "hypothetical jurisdiction," under which it would do precisely what it did here: leave standing issues unresolved when it preferred to decide cases on the merits instead. *Id.* at 94. This Court should not allow the Ninth Circuit to flout its rulings in this manner.

Even the State's contention (Opp. at 13) that two of the Justices who wrote separately in *Steel Co.* would condone the Ninth Circuit's merits-before-jurisdiction decision here is incorrect. Although those Justices would have permitted courts to avoid difficult standing questions in limited circumstances, they would have allowed such action only "assuming an easy answer on the substantive merits." *Id.* at 111 (Breyer, J., concurring in part and concurring in the judgment). The merits here involve the constitutionality of a state law that, at the very least, is in substantial tension with the Supremacy Clause. No Justice has ever suggested that a

federal court may resolve such a difficult constitutional issue before assuring itself it has jurisdiction to do so.

B. The Ninth Circuit's Decision Creates a Conflict in the Lower Courts.

The State contends the Ninth Circuit's refusal to grant standing to the students does not conflict with *Gwinn Area Community Schs. v. Michigan*, 741 F.2d 840 (6th Cir. 1984), and *Shepheard v. Goodwin*, 280 F. Supp. 869 (E.D. Va. 1968) (three-judge court), because those cases did not involve the federal forest aid program. Opp. at 14. But this assertion, once again, misapprehends basic Article III standing principles. Standing does not necessarily turn on the precise substantive statute involved in a case. It turns instead on injury, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The State does not contest that the Student Petitioners are suffering the same kind of injury (educational harm); caused by the same kind of law (one that treats federal aid dollars as a substitute for otherwise available state education dollars); that is redressable in the same way (requiring the State to treat the federal money as a "supplement" to that otherwise available aid) as the student-plaintiffs in *Gwinn* and *Shepheard*. *See* Pet. at 20-22 (explaining equivalence of standing issues in these cases). Accordingly, in every meaningful sense, the Ninth Circuit's decision conflicts with those decisions.

III. This Court Should Determine Whether States May Use Federal Forest Funds as a Substitute, Instead of a Supplemnent, for Funds It Otherwise Makes Available To Public Schools.

The State's defense of the Ninth Circuit's holding on the merits is ineffective, and its suggestion that this issue is not important is incorrect.

A. The Ninth Circuit Erred in Holding That the Federal Forest Payments Program Does Not Pre-empt the State's Offsetting Statute.

The pre-emption question here is whether the State's offsetting statute, Wash. Rev. Code §28A.520.020(3), "conflicts with federal law or stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 260 (1985) (internal quotation omitted). This Court's decision in *King County v. Seattle Sch. Dist. No. 1*, 263 U.S. 361 (1923), says nothing whatsoever about this issue. That case involved the distinct issue of whether federal law restricts how States apportion their federal forest revenues *between* schools and roads. This Court held that States may apportion the aid however they wish, so long as it is used *"for the purposes stated"* in 16 U.S.C. §500 – that is, for schools and roads. *King County*, 263 U.S. at 364 (emphasis added); *see also id.* ("for the specified purposes"); *Eminence R-1 Sch. Dist. v. J.D. Hodge*, 635 S.W.2d 10, 11 (Mo. 1962) (funds must be used for schools and roads). But here, the State, by using 50% of its forest funds as a substitute for otherwise available state education dollars, is effectively treating that federal money as a windfall to use on any project it likes anywhere in the State. In other words, the State is not using this money to benefit schools *or* roads. The Ninth Circuit here, and the Washington Supreme Court in *Carroll v. Bruno*, 499 P.2d 876 (Wash. 1972), are only courts that have ever held that such a practice is not pre-empted.[2]

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[2] Contrary to the State's assertion, the Oklahoma Supreme Court in *State v. State Bd. of Educ.*, 293 P.2d 583 (Ok. 1956), did not address whether federal law pre-empted offsetting; it held only that offsetting was permitted by *state* law. Oklahoma has repealed the state statute at issue there, and it now appears to use federal forest aid as a supplement to other state funds. In *Goodin v. Board of Educ.*, 601 P.2d 88 (Ok. 1979), the Court considered a school district's claim that its location adjacent to a national forest made it eligible to receive federal forest funds. Bringing

The State's defense of these decisions, however, as consistent with the terms of the federal forest statutes (Opp. at 11) cannot withstand scrutiny. Section 500 directs States to use federal forest aid "for the benefit of public schools and public roads" in forest counties. This Court recently held that an entity receives a "benefit" from a federal program if it "derive[s] significant advantage" from it. *Fischer v. United States,* 529 U.S. 667, 678 (2000). Yet, under the State's offsetting regime, it is the State's general fisc, not impacted schools, that "derives significant advantage" from the federal forest aid that the State earmarks for education. The impacted schools end up not one penny better off as a result of the federal aid. By totally negating the benefit that federal forest aid is supposed to deliver to forest county schools, Wash. Rev. Code §28A.520.020(3), plainly obstructs federal law.

The Secure Rural Schools Act's provision stating that federal forest aid "supplements other available funds," §2(b)(1), confirms this analysis – and it is especially telling that the State never even attempts to explain how its offsetting law could possibly be consistent with this provision. At least the Ninth Circuit realized it was required to give some effect to that language. But, as Petitioners explained in their Petition for Certiorari at 27-28, the Ninth Circuit mistakenly concluded that the "supplement" phrase referred to a different federal aid program. Apparently realizing that the Ninth Circuit was wrong on this score, the State does not defend the court's reasoning.

Yet the State's approach of pretending that the phrase "supplements other available funds" does not exist is, if anything, worse than the Ninth Circuit's error. It is an "elementary canon of construction that a statute should be

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such a lawsuit in Washington would be nonsensical because it would not affect the total amount of money a school district would receive.

interpreted so as not to render one part inoperative." *Colautti v. Franklin,* 439 U.S. 379, 392 (1979). Once one gives effect to the "supplement" proviso, it is impossible to avoid the conclusion that the State's use of federal forest aid as a substitute for otherwise available state funds frustrates federal law.

Not only does the State ignore the most critical provision of the Secure Rural Schools Act, but, when it briefly mentions the Act, *see* Opp. at 11, the State offers a construction that drains the whole Act of any effect whatsoever. The indisputable purpose of the Act was to stabilize waning forest fund payments by giving localities a choice between receiving their customary 25% payment or an alternate, guaranteed minimum payment. Secure Rural Schools Act §§2(a)(9)-(10), 2(b)(1), & 102(a)-(b); Opp. at 11. But if States are allowed to use this federal aid as a substitute for otherwise available funds, then it makes no difference to local Washington communities whether they choose the 25% payment or the alternate amount. Their public schools will get the same amount regardless. This Court should refuse to condone such an illogical interpretation of the Act, which would transform it into a meaningless charade.

The State's final protestation – that the Secure Rural Schools Act did not "alter" the distribution rules contained in §500 (Opp. 11) – is legally irrelevant. Even if that subsequent Act did not expressly "amend" §500, this Court has explained that "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended." *United States v. Estate of Romani,* 523 U.S. 517, 530-31 (1998). The Secure Rural Schools Act specifically provides that federal forest funds are intended to "supplement[] other available funds." §2(b)(1). That policy must control here.

B. This Issue Is of Vital Importance.

Finally, the State seeks to diminish the importance of this pre-emption issue by noting that Petitioner Okanogan School District is losing *only* about $100,000 per year. These, however, are critical dollars. Notwithstanding its appellation, the State's "basic education allowance" does not provide Okanogan with enough money to hire teachers and buy books. An extra hundred thousand dollars per year would allow the School District, for instance, to re-staff the three teaching positions it recently had to terminate, or to purchase hundreds of new textbooks each year.

More to the point, the State ignores the fact that Okanogan School District is only one of dozens of school districts in Washington and Oregon that are losing the vital federal aid that Congress intended them to receive. Washington received a total of $44 million in federal forest payments in 2001. Pet. App. 53a. Oregon, the other state with an offsetting law, received $155 million. *Id.* Together, this accounts for about 54% of the federal forest aid distributed nationally. This Court's guidance is essential to determine if this substantial portion of federal aid that serves "a high priority for this Administration," Pet App. 50a, is being used unlawfully.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEPHEN M. RUMMAGE
Counsel of Record
JEFFREY L. FISHER
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150

Attorneys for Petitioners